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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-312

ALCAN SALES DIV. OF ALCAN ALUMINUM CORPORATION,

Petitioner,

vs.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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Petitioner,

vs.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Alcan Sales Division of Alcan Aluminum Corporation petitions for a writ of certiorari to review a final judgment of the United States Court of Customs and Patent Appeals upholding the constitutionality of the President's imposition of an import duty pursuant to a proclamation of a national emergency.

Opinions Below

The opinion of the United States Court of Customs and Patent Appeals (C.A.D. 1170, June 3, 1976) is reported at 63 C.C.P.A. ———, Customs Bulletin and Decisions of June 23, 1976, page 22, and 534 F.2d 920. The opinion of the United States Customs Court (C.D. 4633, February 5, 1976) is reported at 76 Cust. Ct. ———, Customs Bulletin and Decisions, March 3, 1976, page 15. The opinions

of the courts below are reproduced in the Appendix to this Petition, pages 1a through 3a.

The lower courts held that this case was controlled by the decision of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, 63 C.C.P.A. ———, C.A.D. 1160, 526 F.2d 560 (1975). That decision reversed the decision of the Customs Court reported at 73 Cust. Ct. 1, 378 F.Supp. 1155 (1974). Both the Court of Customs and Patent Appeals and the Customs Court decisions in *Yoshida* are reproduced in the Appendix, pages 4a through 39a and 40a through 92a respectively.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1256. The judgment of the Court of Customs and Patent Appeals is dated, and was entered on, June 3, 1976.

Questions Presented

1. May the President, by proclamation of "national emergency," assume the power, explicitly committed to the Congress by the Constitution, to levy duties on imports?

2. Such power not having been granted to the President under any trade agreements legislation, i.e., the Tariff Act of 1930 or the Trade Expansion Act of 1962, did the Congress delegate such power to the President under Section 5(b) of the Trading With the Enemy Act of 1917, authorizing, among other things, the regulation of importation under certain circumstances?

3. If so,

(a) Does Section 5(b) of the Trading With the Enemy Act authorize the President, in peacetime, to impose duties on goods from friendly foreign nations?

(b) Does Section 5(b) of the Trading With the Enemy Act provide constitutionally valid standards for the exercise of delegated Presidential power?

Constitutional and Statutory Provisions and Proclamations Involved

Constitutional Provision

Article I, Section 8, Clause 1:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises. . . ."

Statutes

Section 5, Trading With the Enemy Act; (50 U.S.C. App. § 5; see Appendix, page 93a for full text).

"(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, . . . by means of instructions, licenses, or otherwise—

• • •

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, . . . and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President. . . ."

Section 350, Tariff Act of 1930 (19 U.S.C. § 1351; see Appendix, page 96a).

Section 102, Trade Expansion Act of 1962 (19 U.S.C. § 1801; see Appendix, page 98a).

Section 201, Trade Expansion Act of 1962 (19 U.S.C. § 1821; see Appendix, page 98a).

Section 252, Trade Expansion Act of 1962 (19 U.S.C. § 1882; see Appendix, page 99a).*

Section 255, Trade Expansion Act of 1962 (19 U.S.C. § 1885; see Appendix, page 99a).

Presidential Proclamations

Proclamation 4074, 3 C.F.R. 80 (1971 Comp.) (See Appendix, page 101a for full text):

"IMPOSITION OF SUPPLEMENTAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

"By the President of the United States of America
A Proclamation

"WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

"WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

"WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as 'the Tariff Act'), and the Trade Expansion Act of 1962 (hereinafter referred to as 'the TEA'), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

"WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;

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* Section 252 was repealed by Section 602, Trade Act of 1974, which promulgated comparable provisions in Section 301.

"NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

"A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

"B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

"C. To implement section B of this Proclamation, the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States: . . . ."

Proclamation 4098, 3 C.F.R. 116 (1971 Comp.) (See Appendix page 105a):

"TERMINATION OF ADDITIONAL DUTY FOR BALANCE OF PAYMENTS PURPOSES"

Statement of the Case

This case raises fundamental and far-reaching questions as to the nature and extent of the President's powers, if any, to lay customs duties on imports; indeed, to effectively control all foreign commerce.

On August 15, 1971, President Nixon issued Proclamation 4074, effective August 16, 1971, imposing a supplemental duty of 10 per cent ad valorem upon most articles imported into the United States, by suspending trade agreement concessions. The President cited generally his authority under the Constitution and statutes, including, but not limited to, the Tariff Act of 1930, as amended, and the Trade Expansion Act of 1962, as amended.

No reference to the Trading With the Enemy Act of 1917, as amended, was made in the proclamation itself or in the subsequent Opinion of the General Counsel of the Treasury, entitled "Legal Basis for the Imposition of a Surcharge," issued on September 29, 1971 (App. 107a).

Finding that "there has been a prolonged decline in the international monetary reserves of the United States" which seriously threatened our trade and international competitive position and potentially impaired our security, the President: (a) declared a "national emergency," (b) "terminated in part" and "modified" prior Presidential Proclamations carrying out trade agreements, and (c) "suspended" such proclamations "only insofar as is required to assess a surcharge in the form of a supplemental duty" of 10 per cent ad valorem.*

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* Proclamation 4074 also created a new subpart C of Part 2 of the Appendix to the Tariff Schedules of the United States entitled "Temporary Modifications for Balance of Payments Purposes." The relevant statute specifies that Part 2 is to contain temporary modifications of the Tariff Schedules, as proclaimed by the President *"pursuant to trade agreements legislation"*, i.e. Tariff Act of 1930; Trade Expansion Act of 1962. (emphasis supplied)

Proclamation 4074 was superseded on December 21, 1971, by Proclamation 4098 (App. 105a), which terminated the 10 per cent supplemental duty and proclaimed that restoration of pre-surcharge rates was "required or appropriate to carry out . . . trade agreements" entered into under authority of the Tariff Act and Trade Expansion Act. The declaration of national emergency continued in effect.

On December 20, 1971, petitioner, an importer of aluminum products, filed a protest with the appropriate customs officer against the assessment of the additional duty upon importations of aluminum ingot from Canada.* Following the denial of the protest, petitioner brought suit in the Customs Court challenging the duty imposed by Proclamation 4074. That court had jurisdiction under 28 U.S.C. § 1582.

The United States successfully moved for summary judgment on the basis of the decision of the Court of Customs and Patent Appeals upholding the Proclamation in *United States* v. *Yoshida International, Inc.*, 63 C.C.P.A. ——, 526 F.2d 560 (1975). On appeal, the Court of Customs and Patent Appeals affirmed, noting that although the parties and the goods (zippers versus aluminum ingot) differed, the controlling facts and applicable law were the same as in *Yoshida*.**

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* Many other types of merchandise were the subject of protest by other importers. The total amount collected has been estimated to be approximately $500 million. *See* United States v. Yoshida International, Inc., *supra*, note 25 (App. 26a).

** The issues raised by *Yoshida* have prompted much scholarly comment. *See, e.g.*, 73 Mich.L.Rev. 952 (1975) (concluding that Proclamation 4074 is valid, not under Section 5(b) of TWEA but under the Trade Expansion Act of 1962); Note, *The United States Response to Common Market Trade Preferences and the Legality of the Import Surcharge*, 39 U.Chi.L.Rev. 177 (1971) (finding no constitutional or statutory justification); Comment, *The Import*

(footnote continued on following page)

A specially convened three-judge panel of the Customs Court in *Yoshida* had held initially that the President was without any power—constitutional or statutory—to impose a surcharge, and that therefore the President's Proclamation was *ultra vires*. The Customs Court ruled that neither the language nor the legislative history of the Tariff Act of 1930 or the Trade Expansion Act of 1962 provided any basis for Proclamation 4074.* The Government's suggestion that Section 5(b) of the Trading With the Enemy Act ("TWEA") could be used as a justification of the President's action was also rejected. The Customs Court reasoned that the power to "regulate" foreign commerce, including "importation," does not necessarily include the power to levy duties on imports, and that the delegation of specific regulatory authority "by means of instructions, licenses, or otherwise" in Section 5(b) of the TWEA was limited to a "specific mode of regulation, as distinguished from the full and all-inclusive power to regulate foreign commerce." (App. 68a-70a). The Customs Court applied the rule that "legislation delegating restrictive regulatory authority cannot operate, merely upon the declaration of an emergency, to the exclusion of other legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought to be attained by Presidential Proclamation 4074." (App. 69a).

The Court of Customs and Patent Appeals in *Yoshida* adopted the reasoning of the Customs Court in ruling that authority for Proclamation 4074 could not be found in trade agreements legislation, i.e., either the Tariff Act

(footnote continued from preceding page)

Surcharge of 1971: A Case Study of Executive Power in Foreign Commerce, 7 Vand.J. Transnat'l L. 137 (1973) (justification under TEA combined with the President's inherent powers of foreign affairs). *See generally* 15 Va.J.Int'l.L. 649 (1975).

* The Court observed that there is no authorization to the President to determine and fix a rate of duty which has not been previously established by statute or trade agreement. (App. 50a-58a).

or the Trade Expansion Act. However, recognizing that it was treading "new ground" and that there was "nothing in the TWEA or in its history which specifically either authorizes or prohibits the imposition of a surcharge, and no judicial precedent involving the same . . ." (App. 17a), it held that a broad reading of Section 5(b) of the TWEA would support the Proclamation and on this ground reversed the decision of the Customs Court. The appellate court observed that the power to tax and to levy duties upon imports and the power to regulate commerce are distinct (*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824)), but reasoned that the former power may be subsumed in the exercise of the latter. Because Section 5(b) of the TWEA did not explicitly *prohibit* executive imposition of an import duty, the Court of Customs and Patent Appeals concluded that during the national emergency proclaimed by the President—which emergency remains in effect—the delegation to him of power to "regulate . . . importation" encompassed the power to impose duties. The requirement of a standard or "intelligible principle" to guide the exercise of presidential action was held to have been met by the language of Section 5(b). (App. 32a).

Reasons for Granting the Writ

The decision of the Court of Customs and Patent Appeals in this case is of transcendent national importance. Grounded on its decision in *Yoshida*, which it conceded to be without precedent and to tread "new ground," the court's holding sanctions presidential usurpation of power reserved by the Constitution to the Congress and not delegated by the Congress to the President by the TWEA or otherwise.

The implications of the decision and opinion are grave and far-reaching. If the President, by a proclamation based

on a non-reviewable declaration of "national emergency"* in peacetime, may assume the full panoply of Congressional power under Article I, Section 8 of the Constitution, and do so with respect to imports from friend and foe alike, the basic principle of separation of powers has been interred. Unless the decision is reversed, the consequences of such a *carte blanche* authorization of Executive intrusion into the domain of the Congress threaten the very heart of constitutional government.

I. The lower Court decided an important question of federal law which has not been, but should be, settled by this Court.

The *Yoshida* decision, the basis of the decision below, is the first and only decision by any federal court holding that the President may take action under Section 5(b) of the TWEA merely by proclamation and without Congressional assent, in the field of tariff law made the exclusive province of the Congress by the Constitution.** By its unprecedented validation of the assumption of such power, the lower court has permitted the Executive to override this country's prior enacted trade legislation (Tariff Act of 1930; Trade Expansion Act of 1962, each as amended)

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* *See e.g.* Sardino v. Federal Reserve Bank, 361 F2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966); Werner v. United States, 233 F.2d 52 (9th Cir.), *cert. denied*, 352 U.S. 842 (1956). One commentator has pointed out that "emergencies" are situations "which have not attained enough of stability or recurrency to admit of their being dealt with according to rule." E. Corwin, The President 3 (4th ed. 1957). In light of the "prolonged" deterioration in our balance of payments posture, it seems most difficult to justify the 1971 situation as one necessitating emergency action.

** Both the Customs Court and the Court of Customs and Patent Appeals correctly viewed Presidential imposition of the additional duty as not involving an exercise of the President's inherent foreign affairs power under Art. II, § 1.

and the carefully drafted standards and procedures for the imposition of import duties which they contain. As noted in the Customs Court in a concurring opinion in *Yoshida*: "[The] finding that the President has the power under section 5(b) to impose whatever tariff rates he deems desirable simply by declaring a national emergency would not only render our trade agreements program nugatory, it would subvert the manifest Congressional intent to maintain control over its Constitutional powers to levy tariffs." (App. 89a).

It is difficult to see how the language of Section 5(b), particularly when viewed against the precision employed in tariff legislation, authorizes the usurpation of the Congressional prerogative which the Court of Customs and Patent Appeals endorsed. The notion that the Congress ever intended, by Section 5(b) of the TWEA, to sanction unilateral presidential intervention in imposing customs duties is contrary to all the relevant legislative history. As originally passed by the House in 1917, the TWEA did not grant the President the power to regulate imports.* Subsequently, the Congress enacted Section 11 specifically authorizing the President "during the present war" to control imports when he determined the public safety so required. At the close of World War I, Section 5(b) authority continued in reserve but Section 11 power lapsed and has never been re-enacted.

Although 1941 amendments to Section 5(b) added, *inter alia*, "importation" of goods to the list of activities that could be regulated "by means of instructions, licenses, or otherwise," there is no indication that Congress authorized the President to lay duties. Indeed, Congressional debates suggest that the 1941 amendment was only concerned with the administration's request to give the President authority

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* *See* letter from Treasury Secretary William G. McAdoo to Senator Ransdell, dated Sept. 11, 1917, 55 Cong. Rec. 7013 (1917).

actively to use property seized under his vesting power. As then Representative Kefauver noted:

> ". . . The explanation made to us, and I think it is carried out in this bill, is that *the only change* the Treasury wanted in 5(b) of the Trading with the Enemy Act was to give the executive department power not only to passively freeze credits and to negatively handle the operation of some manufacturing plants by a system of licenses or controls that they have to work under at the present time, but also to give the President the power to actively put into operation those interests or those securities or plants that might be taken over and be seized under authority of 5(b) of the present act." 87 Cong. Rec. 9865 (1941) (emphasis supplied).

As Judge Maletz succinctly put it in *Yoshida* (App. 88a):

> "[N]owhere in the Congressional debates, committee hearings or reports on section 5(b) and the amendments thereto is there even a glimmer of a suggestion that Congress ever intended—or even considered—this section as a vehicle for delegating any of its tariff-making authority."

When this Court first construed the scope of the vesting power of the TWEA, as amended shortly after Pearl Harbor by the First War Powers Act of 1941 (55 Stat. 839), it was defined generally to encompass the appropriation, not of friendly or neutral assets, but of enemy interests which masqueraded under innocent fronts (the so-called "enemy tainted" property). *Clark* v. *Uebersee Finanz-Korp,* 332 U.S. 480, 485 (1947). The Court emphasized that there was "not the slightest suggestion that Congress was concerned under this Act with property owned or controlled by friendly or neutral powers and in no way utilized by the Axis." 332 U.S. at 487.

Although additional duties have not been imposed pursuant to Proclamation 4074 since December 1971, the national emergency declared by President Nixon is still in effect. Thus, the decision below leaves the stage set for other unfettered presidential action, notwithstanding continued Congressional activity in this area such as the Trade Act of 1974.

Before the potentially insidious ruling of the Court of Customs and Patent Appeals is allowed to stand, the important and serious federal questions involved should be reviewed by this Court.

II. The reasoning of the lower Court is in conflict with applicable decisions of this Court.

The decision of the Court of Customs and Patent Appeals contravenes this Court's prior pronouncements and, in essence, sanctions abuse of Executive power. The need to safeguard the basic doctrine of separation of powers has been reaffirmed recently in *Buckley* v. *Valeo,* 423 U.S. —— 44 U.S.L.W. 4127 (Jan. 30, 1976). Citing Montesquieu, the Court warned that "when the legislative and executive powers are united in the same person or body, there can be no liberty."

In 1952, this Court faced head-on the issue of executive usurpation of power in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). There, President Truman had sought to avert a nationwide strike of steel workers, which he deemed to be injurious to national defense, by issuing an Executive Order directing the Secretary of Commerce to seize and operate most of the nation's steel mills. Speaking for the Court in striking down the President's action, Mr. Justice Black observed that "the President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President" (343 U.S. at 588), and pointed out that "the

Founders of this Nation entrusted the *law-making power to the Congress alone in both good and bad times.*" (343 U.S. at 589) (emphasis supplied). In a concurring opinion, Mr. Justice Jackson in a similar vein wrote that presidential power is at its lowest ebb when not of a kind inherent to the office and incompatible with the expressed or implied will of the Congress (343 U.S. at 637). And Mr. Justice Frankfurter, referring to Mr. Justice Holmes' dissent in *Myers* v. *United States*, 272 U.S. 52, 177 (1926), echoed: "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power" (343 U.S. at 610).

Moreover, the Court of Customs and Patent Appeals decision misapplies this Court's repeated admonitions regarding "intelligible standards" for determining both (a) whether there has been any delegation of legislative power at all to the Executive and (b) whether there are adequate guidelines for channeling action pursuant to any such delegated power. See *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935); *Hampton & Co.* v. *United States*, 276 U.S. 394 (1928).

More recently, in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), a statute authorizing agency heads to impose "fees" on community antenna television systems based on "value to the recipient" and "public policy or interest served, and other pertinent facts" was construed narrowly. This Court excised the "public policy" criterion because of concern that its presence would render the delegation unconstitutionally vague. Further, giving full weight to Congressional primacy with respect to taxation, the Court observed that the power to control tax incidence would effectively enable an Executive official to affect substantive policy outcomes "in the manner of an Appropriations Committee of the House" (415 U.S. at 341). Since the power to control tariff incidence by the

alteration of duties can be similarly employed, the concerns of *National Cable Television* regarding executive flouting of legislative intent dictate a similarly limited construction of Section 5(b) of the TWEA.

Last term, this Court held in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, —— U.S. ——, 44 U.S.L.W. 4883 (June 15, 1976), that Section 232(b) of the Trade Expansion Act of 1962 authorizing the Executive to "take such action . . . as he deems necessary to adjust . . . imports to prevent impairment of national security" constitutes a valid delegation of power since the Act establishes clear and detailed preconditions to Presidential action. Under Section 232(b), before there can be a declaration that "impairment of national security" is imminent, specific findings of fact must be made by the Secretary of the Treasury and be reported to the President. Criteria that must be considered are carefully specified and include:

> ". . . domestic production needed for projected national defense requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries. . . ." 19 U.S.C. § 1862(c).

Both officials are further instructed to consider the impact of foreign competition on the economic welfare of individual domestic industries, including any substantial unemployment, decrease in revenues of government or loss of skills or investment which might ensue.

In stark contrast, as the lower Court expressly noted (App. 24a-25a), Section 5(b) of TWEA contains no criteria

whatever for guiding the exercise of the President's discretion. There is no requirement for fact-finding or even for investigation. Unlike any other Congressional delegation of its Article I, Section 8 powers, the President, in the view of the Court below, is endowed with unfettered personal discretion. Recognizing that such a sweeping grant of authority could be viewed as "dangerous" in the hands of an "unscrupulous, rampant President" (App. 38a), the Court below observed that such authority was "reasonably" exercised in Proclamation 4074.

The question, of course, is one of the existence of power, not of the wisdom or restraint of its exercise in a particular instance.

The Court of Customs and Patent Appeals has sanctioned an unconstitutional seizure of Congressional power which merits close scrutiny by this Court.

III. The lower Court's Interpretation of the scope of Section 5(b), TWEA, is in apparent conflict with that of the Third Circuit.

Courts of Appeal have dealt with the scope of direct regulation under Section 5(b) of the TWEA on a number of occasions. The latest pre-*Yoshida* decision was that of the Third Circuit in *Veterans & Reservists for Peace in Viet Nam* v. *Regional Commissioner of Customs,* 459 F.2d 676 (3d Cir.), *cert. denied,* 409 U.S. 933 (1972).* There the Court upheld the seizure of North Vietnamese publications imported in violation of the licensing requirements of the Foreign Assets Control Regulations, 31

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* *See also* Nielson v. Secretary of the Treasury, 424 F.2d 833 (D.C. Cir. 1970) (Cuba); Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), *cert. denied,* 394 U.S. 977 (1969) (Communist China, North Viet Nam); Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966) (Cuba), all of which involved goods from countries perceived to be hostile to the United States.

C.F.R. Part 500, promulgated under the authority of Section 5(b).

The Third Circuit repeatedly emphasized that Section 5(b) is directed to commerce with nations having an inimical relationship with the United States. The Court observed in this regard:

> "There is little doubt regarding the propriety of the purpose of the Trading With the Enemy Act. Its obvious goal is to prevent *countries such as North Vietnam and Communist China* from deriving any economic benefit from transactions with persons subject to the jurisdiction of the United States. (emphasis supplied) (459 F.2d at 680).
>
> • • •
>
> "Section 5(b) does not directly regulate First Amendment protected material, rather *it controls transactions concerning property in which an enemy has an economic interest.* (emphasis supplied) (459 F.2d at 681).
>
> • • •
>
> "The whole thrust of the Act and regulations is to ensure that certain countries do not achieve economic benefit from transactions involving persons subject to the jurisdiction of the United States. If the Office of Foreign Assets Control attempted to apply any other standard, its actions might well be unconstitutional. See Kent v. Dulles, 357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958), cf. United States v. Thirty-Seven Photographs, *supra;* Lamont v. Postmaster General, *supra.* But such a case is not now before us, and we hold here only that so long as the Government applies the standards implicit in the Act and regulations, the discretion vested in the Office of Foreign Assets Control is not so broad as to be unconstitutional." (459 F.2d at 682).

The action of the President in Proclamation 4074, upheld by the Court of Customs and Patent Appeals in *Yoshida,* is diametrically opposed to the standards which the Third Circuit found to be "implicit in the Act." The very purpose and effect of the Proclamation was to burden and tax transactions with friendly trading partners only. Countries whose interests were antagonistic or inimicable to those of the United States were *specifically excluded.*• No such action was ever before attempted.

The interpretation of Section 5(b) by the Third Circuit cannot be reconciled with that of the *Yoshida* court. By upholding the President's unprecedented assumption of power, the *Yoshida* interpretation creates a vast potential for future abuse, requiring this Court's review.

• Proclamation 4074, in paragraph B(2), provided that the surcharge would not apply to merchandise subject to "Column 2" rates, i.e., the products of Communist bloc countries. (*See* General Headnote 3(e), Tariff Schedules of the United States.)

Conclusion

Proclamation 4074 involved no less than a naked usurpation of power by the President. In upholding that action the court below ignored earlier teachings of this Court and interpreted Section 5(b) of the TWEA in disregard of the plain meaning of that Section and its legislative history and in conflict with a ruling of the Third Circuit.

The questions raised by this petition are of such consequence to constitutional government that their resolution by this Court is imperative.

Respectfully submitted,

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August 31, 1976

APPENDIX

UNITED STATES CUSTOMS COURT

C.D. 4633

COURT No. 72-9-01963

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

JUDGMENT ORDER

Upon reading and filing defendant's motion for summary judgment accompanied by a statement of material facts, plaintiff's response to defendant's motion for summary judgment, plaintiff's statement pursuant to Rule 8.2(b), the record in *The United States* v. *Yoshida International, Inc.*, 63 CCPA ——, C.A.D. 1160 (1975), incorporated herein, and upon all other papers and proceedings had herein, it is hereby

ORDERED, ADJUDGED and DECREED that in view of the decision of the United States Court of Customs and Patent Appeals, 63 CCPA ——, C.A.D. 1160 (1975), which reversed the decision of this court in *Yoshida International, Inc.* v. *The United States*, 73 Cust. Ct. 1, 378 F. Supp. 1155, defendant's motion for summary judgment be, and the same hereby is granted, and the assessment of the supplemental duty of 10% ad valorem under item 948.00, Ap-

pendix to the Tariff Schedules of the United States, is hereby sustained.

Dated at New York, New York this 5th day of February, 1976.

NILS A. BOE
Chief Judge

HERBERT N. MALETZ
Judge

EDWARD D. RE
Judge

UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Customs Appeal No. 75-6.

C.A.D. 1160

THE UNITED STATES,

Appellant,

v.

YOSHIDA INTERNATIONAL, INC.,

Appellee.

DECIDED: November 6, 1975

MARKEY, Chief Judge.

This is an appeal from a judgment of the Customs Court, 73 Cust. Ct. 1, C.D. 4550, 378 F. Supp. 1155 (1974), granting Yoshida's motion for summary judgment, and declaring an import duty surcharge invalid. Presidential Proclamation 4074, because it imposed the surcharge, was held to have been beyond the President's delegated powers. The court stated that a delegation of sufficient breadth to encompass the proclamation would have been unconstitutional. We reverse.

Facts

Yoshida's merchandise (zippers) was imported from Japan and entered the port of New York on August 17, 25, and 26, 1971. The government levied, in addition to the standard duty under TSUS item 745.72, an import duty surcharge of 10% in accordance with item 948.00,

which was added to the TSUS by Presidential Proclamation 4074.[1] Yoshida challenges only the validity of Proclamation 4074.

Amicus

American Importers Association, Inc., filed a brief *amicus curiae* seeking, in the event of an affirmance, a declaration that the liquidations herein were null and void and the protests premature, the effect of which would be to remove barriers to a refund of amounts exacted by the surcharge. The government filed an opposing brief. The judgment below being reversed, the requests of *amicus* must be dismissed as moot.

President's Actions

During the summer of 1971, the United States was faced with an economic crisis. The nation suffered under an exceptionally severe and worsening balance of payments deficit. The gold reserve backing of the U. S. dollar had dropped from $17.8 billion in 1960 to less than $10.4 billion in June of 1971,[2] reflecting a growing lack of confidence in the U. S. dollar abroad. Foreign exchange rates were being controlled by some of our major trading partners in such a way as to overvalue the U. S. dollar. That action, by stimulating U. S. imports and restraining U. S. exports, contributed substantially to the balance of payments deficit.[3] As one step in a program designed to meet the

[1] 85 Stat. 926, dated August 15, 1971, effective August 16, 1971.

[2] Treasury Bulletin, U.S. Treas. Dept., July 1971.

[3] Though deficits had occurred in some prior years, the deficit (official reserve transactions balance) amounted to $22 billion (annual rate) during the first quarter of 1971. U.S. Dept. of Commerce, Office of Business Economics, news release OBE 71-43, July 6, 1971.

The U.S. balance of exports and imports had changed from a favorable average annual balance of $5.4 billion during the first

(footnote continued on following page)

economic crisis,[4] the President issued Proclamation 4074, which in relevant part stated:

> WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;
>
> WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;
>
> • • •
>
> A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

(footnote continued from preceding page)

half of the 1960's (the high point was $7.1 billion in 1964) to a negative balance of $3.2 billion (annual rate) for the second quarter of 1971. Overseas Business Reports OBR 71-009, U.S. Dept. of Commerce, Feb. 1971; U.S. Dept. of Commerce, Bureau of the Census, news release FT 900-71-6, July 28, 1971; see also Economic Report of the President 149 and 296 (1972). Vis-à-vis the United States, Japan's trade balance changed from minus $250 million in 1964 to plus $1.2 billion in 1970, and the Federal Republic of Germany's trade balance changed from minus $449 million in 1964 to plus $390 million in 1970. Overseas Business Reports OBR 71-022, U.S. Dept. of Commerce, July 1971.

[4] The Proclamation in suit was part of a "New Economic Policy," which involved suspension of the convertibility of foreign held dollars into gold, reductions in taxes, Federal spending and foreign aid, a 90-day wage-price freeze, and imposition of the surcharge "[a]s a temporary measure". "Address to the Nation Outlining a New Economic Policy: 'The Challenge of Peace'," *Public Papers of the Presidents of the United States Richard Nixon 1971* 886 (1972), 65 *Dept. of State Bull.* 253 (1971), New York Times, Aug. 16, 1971, at 14, col. 1. The 90-day freeze, though challenged as based upon an unconstitutional delegation of legislative power, in violation of the separation of powers doctrine, was upheld in *Amalgamated Meat Cutters & Butcher Work.* v. *Connally*, 337 F. Supp. 737 (D.D.C. 1971).

> B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.
>
> (2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles • • • provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

To implement the above language, Proclamation 4074 established the following item 948.00 of subpart C, part 2, of the TSUS Appendix:

Item	Article	Rates of duty 1
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements	10% ad val... (See headnote 3 of this subpart.)

The referenced headnote 3 reads as follows:

> 3. *Limitation on additional duties*—The additional 10 percent rate of duty specified in rate of duty column

numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

The President's authority for proclaiming the surcharge was stated in Proclamation 4047 to be:

> WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;
>
> WHEREAS, under the Tariff Act, the TEA and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority; * * *.

Importers of products subject to the surcharge sought and obtained permission from the Cost of Living Council to pass the surcharge through to customers as a part of the price of the imported articles.[5]

Within less than five months following imposition of the surcharge, a multilateral agreement (The "Smithsonian Agreement" of December 18, 1971) among the major industrial nations was reached[6] which, inter alia, gave promise

[5] Cost of Living Council Order No. 2, 36 Fed. Reg. 16215 (1971).

[6] "Group of Ten Ministerial Meeting Agrees on Realignment of Currency and Future Monetary Reforms," 66 *Dept. of State Bull.* 32 (Jan. 10, 1972), Economic Report of the President 142 (1972).

of ending the overvaluation of the U. S. dollar in relation to other major currencies. On December 20, 1971, the import duty surcharge was terminated. (Presidential Proclamation 4098, 36 Fed. Reg. 24201 (1971).)

Customs Court

The main opinion below[7] dealt extensively with the President's termination and emergency powers, finding that neither encompassed the tariff surcharge promulgated in Proclamation 4074.

The President's termination power, as expressed in the Tariff Act of 1930, as amended (Tariff Act) and the Trade Expansion Act of 1962 (TEA), was construed as follows:

> We conclude that the authority granted by statute to "terminate, in whole or in part, any proclamation" does not include the power to determine and fix unilaterally a rate of duty which has not been previously legally established. On the contrary, the "termination" authority, as statutorily granted, merely provides the President with a mechanical procedure of supplanting or replacing existing rates with rates which have been established by prior proclamations or by statute. Relevant thereto is *United States* v. *American Bitumuls & Asphalt Co.*, 44 CCPA 199, C.A.D. 661, 246 F. 2d 270 (1957), *cert. denied*, 355 U.S. 883 (1957).

The power to "terminate, in whole or in part," existing proclaimed rates was characterized as twofold: the President may "nullify and bring to an end an entire proclamation" (whereupon the duty rate would revert to one previously established but not terminated), or he may "specify

[7] The case was heard by a three-judge panel, pursuant to § 108 of the Customs Courts Act of 1970 (28 USC 255) and rule 4.13 of the Customs Court. A concurring opinion and a concurring statement were filed with the main opinion.

the extent to which a prior proclamation is terminated, thereby permitting a portion thereof to remain in effect." Thus, said the court, exercise of the termination power affects duty rates

> • • • (1) to increase rates to the highest level, *i.e.*, the statutory rate, or (2) to raise or lower rates to conform to rates which have been established by a prior proclamation. In either of these instances, the rates, to which conformance may be sought, have been previously established either by the Congress (statutory rate) or by a bilateral negotiation embodied in a trade agreement pursuant to statutory authority. In short, the power to fix a new and independent rate requires a greater grant of power than that delegated to the President by the termination authority.

The Government's reliance on the phrase "unless otherwise provided" in general headnote 4(d) of the tariff schedules[8] was met with these words:

> In our view that phrase is nothing more than an exception to the provision contained in headnote 4(d) fixing the order of rate reversion resulting from a termination proclamation. More specifically, the phrase "unless otherwise provided" gives the President discretionary authority when terminating a proclamation to specify a rate established in a specific previous proclamation other than the next intervening proclamation and thus avoid an automatic reversion to the next intervening proclaimed rate. In other words, the phrase "unless otherwise provided" contemplates only the exercise of Presidential discretion to

[8] General headnote 4(d) provides:

> whenever a proclaimed rate is terminated or suspended, the rate shall revert, unless otherwise provided, to the next intervening proclaimed rate previously superseded but not terminated or, if none, to the statutory rate.

> preclude the order of reversion set forth in general headnote 4(d).

The President's emergency power, as expressed in the Trading With the Enemy Act (TWEA), section 5(b), to "regulate • • • importation • • • of • • • any property in which any foreign country or a national thereof has any interest," said the Customs Court,

> • • • conveys to the President an authority consisting only of a specific mode of regulation, as distinguished from the full and all-inclusive power to regulate foreign commerce. The delegation of the specific regulatory authority, "by means of instructions, licenses, or otherwise," manifestly is restrictive in scope and is but one branch of many attached to the trunk of the tree in which is lodged the all-inclusive substantive power to regulate foreign commerce, vested solely in the Congress.
>
> We, therefore, conclude that section 5(b)(1) of the Act contains such restrictive standards and guidelines as to meet the test of constitutionality, but which, in turn, precludes the President from laying the supplemental duties provided by Presidential Proclamation 4074.

Though recognizing that the power to impose duties "may also serve as a regulatory measure," the Customs Court felt that the power to "regulate" could not, per se, be said to include the power to levy duties, citing *Hamilton* v. *Dillin*, 88 U.S. (21 Wall.) 73 (1875).

The "emergency" feature of the TWEA was noted by the Customs Court in these words:

> For legislation delegating restrictive regulatory authority cannot operate, merely upon the declaration of an emergency, to the exclusion of other legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought

to be attained by Presidential Proclamation 4074. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

* * * If the words "regulate * * * importation" were given the construction contended by the defendant, the President by the declaration of a national emergency could determine and fix rates of duty at will, without regard to statutory rates prescribed by the Congress and without the benefit of standards or guidelines which must accompany any valid delegation of a constitutional power by the Congress. *Hampton & Co.* v. *United States,* [276 U.S. 394] p. 409. The delegation of such an unrestrained and unbridled authority to lay duties, indeed, might well be deemed an abdication by the Congress of its constitutional power to regulate foreign commerce.

Citing *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, 420 (1935), for the proposition that good motives are not in point, the Customs Court summarized its view that neither motive nor national emergency would sustain the President's authority to issue Proclamation 4074 as follows:

> This court is not without appreciation of the burdensome problems encountered by the Executive as he represents these United States in the society of nations. Nor can the court fail to recognize the efforts of the President to achieve stability in the international trade position and monetary reserves of this country. But neither need nor national emergency will justify the exercise of a power by the Executive not inherent in his office nor delegated by the Congress. Expedience cannot justify the means by which a deserving and beneficial national result is accomplished. To indulge in judicial rationalization in order to sanction the exercise of a power where no power in fact exists is to strike the deadliest of blows to our Constitution.

The concurring opinion set forth substantial additional portions of the TWEA's legislative history, with this summarization:

> Thus it can be seen that the amendments to section 5(b) successively extended the President's licensing authority in the areas of foreign exchange, banking and currency transactions and transactions involving property in which foreign countries or nationals have an interest. However, nowhere in the Congressional debates, committee hearings or reports on section 5(b) and the amendments thereto is there even a glimmer of a suggestion that Congress ever intended—or even considered—this section as a vehicle for delegating any of its tariff-making authority. [Footnote omitted.]

Issue

The sole issue before us is whether the Customs Court erred, as a matter of law, in holding that Proclamation 4074 was an ultra vires Presidential act. Resolution of the issue requires determination of whether the surcharge imposed by Presidential Proclamation 4074 was within the delegated authority to be found in either (1) the termination provisions of § 350(a)(6) of the Tariff Act of 1930, as amended (Tariff Act) (19 USC 1351(a)(6)) and § 255(b) of the Trade Expansion Act of 1962 (TEA) (19 USC 1885(b)),[9] or (2) the emergency powers granted

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[9] The Tariff Act and the TEA permit the President to enter foreign trade agreements and to implement them through modification of duties by proclamation. Each contains a termination provision:

> "The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section." (§ 350(a)(6), Tariff Act of 1930, as amended);
>
> "The President may at any time terminate, in whole or in part, any proclamation made under this subchapter." (§ 255(b), Trade Expansion Act of 1962).

by § 5(b) of the Trading With the Enemy Act (TWEA), as amended (50 USC App. 5(b)),[10] and if so, whether such a delegation of authority was constitutional.

OPINION

The people of the new United States, in adopting the Constitution, granted the power to "lay and collect duties" and to "regulate commerce" to the Congress, not to the Executive. U. S. Constitution, Art. I, Sec. 8, clauses 1 and 3. Nonetheless, as the Customs Court recognized in the opinion below, and as other courts and commentators have noted,[11] Congress, beginning as early as 1794 and

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[10] TWEA § 5(b), in pertinent part, follows:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; • • •.

[11] See Recent Decisions, 15 *Va. J. Int'l. L.* 649 (1975); Comment, "The Import Surcharge of 1971: A Case Study of Executive Power in Foreign Commerce," 7 *Vand. J. Transnat'l L.* 137, 155 (1973); Garson & Miller, "The Foreign Direct Investment Regulations: Constitutional Questions and Operational Aspects Examined," 11 *B.C. Ind. & Com. L. Rev.* 143, 168 (1970); Bassiouni & Landau, "Presidential Discretion In Foreign Trade and Its Effect on East-West Trade," 14 *Wayne L. Rev.* 494 (1968).

continuing into 1974,[12] has delegated the exercise of much of the power to regulate foreign commerce to the Executive. As perhaps an inevitable result, "few areas of American constitutional law [are] more burdened with conflicting decisions and scholarly disagreement." Recent Decisions, 15 *Va. J. Int'l. L.* 649 (1975).

As inferred in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the President has certain "inherent" powers in the conduct of foreign relations and foreign affairs. Some of the commentators referred to above have cited certain "concurrent" powers he shares with the Congress in those fields. The Supreme Court referred to "pooled" legislative and executive powers in foreign affairs, including delegations of power over foreign commerce, in *Chicago & S. Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 110 (1948). It is nonetheless clear that no undelegated power to regulate *commerce*, or to set tariffs, inheres in the Presidency.[13]

Termination Provisions

We are in basic agreement with the Customs Court's interpretation (quoted above) of the termination powers delegated by the Congress in the Tariff Act and in the TEA. *United States* v. *American Bitumuls & Asphalt Co.*, 44 CCPA 199, C.A.D. 661, 246 F.2d 270 (1957), *cert. denied*, 355 U.S. 883.

Having correctly found no delegation, in the acts or in their legislative histories, of the power to impose the sur-

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[12] Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372; Trade Act of 1974, Pub. L. No. 93-618, § 1 et seq. (Jan. 3, 1975), 88 Stat. 1978 (19 USC 2101 et seq.).

[13] If the reference in Proclamation 4074 to "the authority vested in him by the Constitution" was intended to indicate the view that the Constitution vests in the President any power to set tariffs or to lay duties or to regulate foreign commerce, that view was clearly in error. U.S. Constitution, Art. I, Sec. 8, clauses 1 and 3.

charge here in qustion, the Customs Court nonetheless applied, and the parties have argued, the "separation of powers doctrine" and its corollary, the "delegation doctrine," in relation to the termination provisions of the Tariff Act and the TEA. But whether the limitations on Congress' power to delegate, as gleaned by the Customs Court from *Schechter Poultry* v. *United States,* 295 U.S. 495 (1935) and *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935), are still viable, or whether they now rest on a rusted concept,[14] are questions raisable only after it is determined that a particular delegation had been attempted. It is unnecessary to discuss the constitutional ramifications that might obtain if Congress *had* made such a delegation in the Tariff Act or in the TEA.[15]

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[14] At least one commentator views *Schechter* and *Panama* as archaic, asserting that the "vaguest of standards are held adequate, and various delegations without standards have been upheld." (Footnote omitted.) 1 K. Davis, *Administrative Law Treatise* 76 (1958).

The Customs Court did not refer to the state of suspended animation in which these two cases have so long lain, or to any distinction between the domestic character of the actions therein and the foreign trade environment of the present case or to the many cases, since 1935, in which the Supreme Court has not followed the rigid view of Congress' power to delegate expressed in those two cases.

Schechter was relied upon by the Supreme Court, for the first time since 1936, in *National Cable Television Assn., Inc.* v. *United States,* 415 U.S. 336 (1974), which did not involve foreign trade. That resurrection of the delegation doctrine was strongly criticized in the dissenting opinion of Mr. Justice Marshall. 415 U.S. at 352.

[15] Of general interest is § 122(h) of the Trade Act of 1974, supra note 12, which *prohibits* use of the termination power as authority for imposition of a surcharge. Though the Tariff Act and the TEA were cited, it is doubtful that Proclamation 4074 was an actual exercise of the termination power. The proclamation refers to "terminate in part" and includes "modify" and "suspended." The reference to "terminate" was only "for such period as may be necessary." The rates of duty were returned by Proclamation 4098 to those in effect prior to Proclamation 4074. The President's Address, supra note 4, described the surcharge, as "a temporary measure" and as a "temporary action" that would end when "the unfair treatment is ended."

Emergency Powers

We are presented, in this case, with the first reliance upon the TWEA as authority for a Presidential imposition of a temporary surcharge on imports. There being nothing in the TWEA or in its history which specifically either authorizes or prohibits the imposition of a surcharge, and no judicial precedent involving the same, we tred new ground.[16]

Power Delegated

Our duty is to effectuate the intent of Congress. In so doing, we look first to the literal meaning of the words employed. *Flora* v. *United States,* 357 U.S. 63, 65 (1958). Analysis of the statute and its wording provides the threshold determination of what *was* delegated by the Congress.

The express delegation in § 5(b) of the TWEA is broad indeed. It provides that the President may, during "any"

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[16] The TWEA has been considered by many different courts in hundreds of cases involving a variety of executive actions. Because it was hastily amended, the TWEA "has presented to the judiciary a collection of knotty problems which are probably not surpassed by those arising under any other statute of its size or weight." Bishop, "Judicial Construction of the Trading With the Enemy Act," 62 *Harv. L. Rev.* 721 (1949). It has nonetheless survived every attack on its constitutionality: See, e.g., *Veterans & Reserv. For Peace in Vietnam* v. *Regional Com'r,* 459 F.2d 676 (3d Cir.), *cert. denied,* 409 U.S. 933 (1972) (literature detained under the Foreign Assets Control Regulations); *Nielson* v. *Secretary of Treasury,* 424 F.2d 833 (D. C. Cir. 1970) (bank account blocked under the Cuban Assets Control Regulations); *Teague* v. *Regional Commissioner of Customs, Region II,* 404 F.2d 441 (2d Cir. 1968), *cert. denied,* 394 U.S. 977 (1969) (publications detained under the Foreign Assets Control Regulations); *Sardino* v. *Federal Reserve Bank of New York,* 361 F.2d 106 (2d Cir.), *cert. denied,* 385 U.S. 898 (1966) (bank account blocked under the Cuban Assets Control Regulations); *Silesian-American Corp.* v. *Markham,* 156 F.2d 793 (2d Cir. 1946), *aff'd sub nom. Silesian-American Corp.* v. *Clark,* 332 U.S. 469 (1947) (corporation stock vested in Alien Property Custodian); *Draeger Shipping Co.* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y. 1944) (corporation stock vested in Alien Property Custodian).

period of national emergency declared by him, through "any" agency he designates, or "otherwise," and under "any" rules he prescribes, by means of instructions, licenses, "or otherwise," "regulate," "prevent" or "prohibit" the importation of "any" property" in which "any" foreign country or a national thereof has "any" interest, and that the President may, in the manner provided, take "other and further measures," not inconsistent with the statute, for the "enforcement" of the Act.

The Act authorizes the President to define "any or all" of the terms employed by Congress in § 5(b). 50 USC App. 5(b)(3).

It appears incontestable that § 5(b) does in fact delegate to the President, for use during war or during national emergency only, the power to "regulate importation." The plain and unambiguous wording of the statute permits no other interpretation. As was said of a war power in *Lichter* v. *United States*, 334 U.S. 742, 782 (1948), the primary implication of an emergency power is that it should be effective to deal with a national emergency successfully. The delegation in § 5(b) is broad and extensive; it could not have been otherwise if the President were to have, within constitutional boundaries, the flexibility required to meet problems surrounding a national emergency with the success desired by Congress.[18]

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[17] Appellee's argument that the TWEA is limited to importations of property having an "enemy taint" is foreclosed by the statutory reference to "any" property of "any" foreign country or national thereof. Appellee misconstrues *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480 (1947), which dealt with the right of a friendly alien to recover property seized under the vesting power. The court did not hold that the vesting power, let alone the regulatory power, was limited to property having an enemy "taint." See *United States* v. *Broverman*, 180 F. Supp. 631, 634-35 (S.D.N.Y. 1959).

[18] Thus the more obvious constitutional questions that would arise if the President had acted in the absence of *any* delegated

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A question remains, however, as to *how* the President may regulate importation in a national emergency, i.e., what means of execution of the delegated power are permissible. As appears below, we agree with the Customs Court that the delegation could not constitutionally have been of "the full and all-inclusive power to regulate commerce." We do not believe, however, as the Customs Court apparently did, that only in such a sweeping delegation could authority be found for Proclamation 4074. The choice is not draconian.

Means of Execution

The Customs Court, considering a broad delegation unconstitutional in the absence of standards restricting the President's actions thereunder, found such standards in an interpretation of the words "by means of instructions, licenses or otherwise" as words of restriction. Citing the war-related history of the Act, commencing with the Act of July 13, 1861 (12 Stat. 255, 257), and its genesis in the common law rule against trading with an enemy, the Customs Court carried through to the present day the licensing or permission to import specific goods originally envisaged as the means of executing the power delegated by the Act.

We agree with the Customs Court on the necessity of determining the scope and extent of delegated regulatory power.[19] The question in this context is whether Congress,

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authority are not present. As discussed below, questions raisable if the President had ventured to act in direct *contravention* of a statute prohibiting or otherwise pre-empting his action are also absent.

[19] The Customs Court cited *Hamilton* v. *Dillin*, 88 U.S. (21 Wall.) 73 (1874) for this proposition. In *Hamilton*, however, it is noteworthy that President Lincoln's imposition of a fee on imports of cotton from insurrectionary states under § 5 of the

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having itself regulated imports by employing duties as a regulatory tool, and having delegated to the President, for use in national emergencies, the power to regulate imports, intended to permit the President to employ the same regulatory tool, and what, if any, limitations lay upon his use thereof.

The opinion below states:

> The words "instructions, licenses, or otherwise" contained in section 5(b)(1) define the nature and mode of the regulatory authority intended to be delegated to the President. These words conform to the phraseology used through the history of the Act in the establishment of a system of *licenses and permits* for the control of property during a time of war and crisis and which have come to be recognized as the hallmark and distinguishing feature of the Act. (Emphasis added.)

We do not find, however, that the words "instructions, licenses, or otherwise," either "conform to the phraseology used throughout the history of the Act" or "have come to be recognized as the hallmark and distinguishing feature of the Act." No specific authority was cited in support of that view and we find none. The words "instructions"

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Act of July 13, 1861, 12 Stat. 257, a progenitor of the TWEA, was *upheld* by the Supreme Court, against the argument that a regulatory fee was *precluded by other statutes* setting a tax on cotton and against the claim that the fee was not a "regulation," saying (88 U.S. at 93):

> It shows, however, that the rule of construction depends, at least in some sort, upon the nature of the subject-matter. In the case before us, the power of the government to open and regulate trade with the enemy was intended to be conferred upon the President and the Secretary of the Treasury. The power of regulation in such a case is to be taken in its broadest sense, and, in our judgment, included the power to impose such conditions as the President and Secretary should see fit.

and "importation" were not added until 1941. As the concurring opinion below recognizes, the legislative history of the TWEA is silent regarding the reasons for the 1941 insertion of those two words. A statute must be interpreted as a whole, and we cannot reconcile the Customs Court's restrictive view with the remainder of § 5(b), which authorizes the President to take numerous actions not amenable to "licensing."

Recognizing that to impose duties can be to "regulate,"[20] the Customs Court nonetheless interpreted the words "the President may • • • regulate • • • importation" as though they read, in effect, "the President may • • • license • • • importation." We cannot agree.

Also relying on the war-related history of the TWEA and its progenitors, appellee argues, in agreement with the Customs Court's view, that the congressional intent of § 5(b) is to allow the President only to permit trade, not to prohibit it. The argument fails on two bases. The statute itself authorizes the President, during emergencies, to "regulate • • • prevent or *prohibit* • • • importation." Secondly, the argument unrealistically by-passes more recent history of the TWEA. The 1933 amendment,[21] delegating power to the President for use in response to economic emergencies (indeed, to "any" national emergency declared by the President, *Pike* v. *United States*, 340 F.2d 487, 489 (9th Cir. 1965)), clearly expanded the purview of the TWEA from that which encompassed only trading with an enemy in time of war to that which also encompassed dealing with "any" national emergency, in

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[20] Though the power to tax and to lay duties upon imports and the power to regulate commerce are distinct, it is well established that the first power can be employed in the exercise of the second. See *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, 428 (1940); *Board of Trustees* v. *United States*, 289 U.S. 48, 58 (1933); *Hampton & Co.* v. *United States*, 276 U.S. 394, 411 (1928); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824).

[21] Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1.

cluding those involving no enemy and no war-related trading.[22]

Adhering to the analogy applied by the Customs Court, which found the roots of the TWEA in the Act of July 13, 1861 and the delegation in § 5(b) a branch of the tree in which congressional power to regulate foreign commerce is lodged, we find, Mendel-like, a cross-breeding which produced an economic emergency branch. Only if the TWEA had remained limited to trading with the enemy in "time of war" would the "licensing" limitation and its historical background be controlling. The First War Powers Act of 1941, 55 Stat. 839, the fourth and last amendment to the TWEA, was indeed "hasty legislation," as described by the Supreme Court in *Clark* v. *Uebersee Finanz Korporation,* supra, note 17, having been adopted upon the onset of war. The Congress, however, did not withdraw or diminish any previously delegated power. Moreover, apparently

[22] A statute is not restricted by its title. *Brotherhood of R.R. Trainmen* v. *Baltimore & O.R.R. Co.,* 331 U.S. 519, 528-9 (1947). We are told that the TWEA was not cited in Proclamation 4074 by name (though it is incorporated by "but not limited to") because it would be inappropriate in a proclamation affecting "friendly" or "neutral" nations. In view of the applicability of the TWEA to "any" period of national emergency it is not necessary to consider international monetary competitors as even economic "enemies." Nor does the fact that Proclamation 4074 had no effect on "hostile" nations not entitled to most-favored-nation treatment influence consideration of an Act directed to "any" property of "any" nation or foreign national. *United States* v. *Quong,* 303 F.2d 499, 503 (6th Cir. 1962), *cert. denied,* 371 U.S. 863. See also *United States* v. *Broverman,* 180 F. Supp. 631 (S.D.N.Y. 1959). Though appellee argues that the surcharge violated our international agreements under the General Agreement on Tariffs and Trade (GATT), and it is true that the GATT forbids the use of surcharges, our Congress has never ratified the GATT; moreover, nine member countries had imposed surcharges (all of which were waived or tolerated by the GATT organization) prior to the issuance of Proclamation 4074. See Comment, "Attacks On The United States Import Surcharge Under Domestic and International Law: A Pragmatic Analysis," 6 *J. Int'l. L. & Econ.* 269, 273 (1972); J. Jackson, *World Trade and the Law of GATT* 711 (1969).

perceiving no threat of abuse of executive power, Congress has been content to let the Act stand untouched for thirty-four years, while various emergencies have been declared and courts have sustained both the breadth of the TWEA and the constitutionality of diverse actions taken under its authority. (See note 16, supra.)

The narrow interpretation adopted by the Customs Court also rests upon disregard of the phrase "or otherwise," which follows "by means of instructions, licenses,"[23] and, thus, would require a re-writing, in effect, of the statute. Judicial power does not extend that far.[24] To treat use of the phrase "or otherwise" by Congress as having been without purpose is to violate a basic rule of

[23] Appellant argues that the import duty surcharge can be considered an "instruction" or a blanket "license" to all who are willing to pay it. Such a strained interpretation is unnecessary, in view of the statutory words "or otherwise." However, we would note that a proclamation setting up individual licenses available to individual importers who would pay a 10% "license fee" would appear to satisfy the need for licensing envisaged by the Customs Court. Under that view, a holding that the surcharge herein was ultra vires would be tantamount to a holding that the President was not authorized, under the TWEA, to do in one stroke what he was fully authorized to do seriatum, i.e., he could not do efficiently that which he was authorized to do only inefficiently.

We note, also, that the "license fee" mechanism involved in *Algonquin SNG, Inc.* v. *Federal Energy Administration,* 518 F.2d 1051, (D.C. Cir. 1975), *cert. granted,* 423 U.S. —— (1975) (No. 75-382) was described by the United States Tariff Commission in its report, *World Oil Developments and U. S. Oil Import Policies,* T.C. Publication 632, at 97 (1973), as a "duty system."

[24] The opinion below does not interpret "or otherwise," except perhaps inferentially in its reference to "the construction contended by the defendant."

For a judicial interpretation of the words "or otherwise," see *Durham* v. *Omaha & Council Bluffs Street Ry. Co.,* 106 F. 2d 1, 3 (2nd Cir. 1939), *cert. denied,* 309 U.S. 661 (1940).

We note, also, the congressional use in § 5(b) of "or otherwise" after "through any agency that he may designate." It would be difficult to hold, for example, that § 5(b) requires the President to use an "agency."

statutory construction. *Ex Parte Public National Bank,* 278 U.S. 101, 104 (1928).

If the phrase "by means of instructions, licenses or otherwise" defines "the nature and mode of the regulatory authority intended to be delegated to the President," it does so very broadly indeed. The phrase appears to us to be expansive, not restrictive. The words "or otherwise," if they mean anything, must mean that Congress authorized the use of means which, though not identified, were *different* from, and additional to, "instructions" and "licenses." Congress, by its use of "or otherwise," signaled its intent not to bind the President into "instructions" or "licenses," or into any other pre-specified means which might preclude his dealing with a national emergency and defeat the purpose of the legislation.

Demonstrably careful and extensive research into the history of § 5(b) led the author of the concurring opinion below to give weight to the lack of an indication that Congress "intended—or even considered—this section as a vehicle for delegating any of its tariff-making authority." However, we do not find it surprising that Congress did not *specify* that the President could use a surcharge in a national emergency. Having left the battlefield, it would hardly do to dictate all the weapons to be used in the fight. Nor do we find anything in the inconclusive and hurried legislative history of § 5(b) which indicates an intent to prohibit action such as that reflected in Proclamation 4074.

We conclude, therefore, that Congress, in enacting § 5(b) of the TWEA, authorized the President, during an emergency, to exercise the delegated substantive power, i.e., to "regulate importation," by imposing an import duty surcharge or by other means appropriately and reasonably related, as discussed below, to the particular nature of the emergency declared. Whether a delegation of such breadth as to have authorized Proclamation 4074 would be constitutionally embraced, is determined, however, by the nature

of the particular surcharge herein and its relationship to other statutes, as well as by its relationship to the particular emergency confronted.

Limited Nature of Proclamation 4074

In its proper concern for adherence to the Constitution, the Customs Court erred, we believe, in its expressed fear that, if Proclamation 4074 were upheld, the President, by "merely" declaring a national emergency, "could determine and fix rates of duty at will, without regard to statutory rates prescribed by Congress." The concurring opinion expressed the same unease in these words:

> Furthermore, a finding that the President has the power under section 5(b) to impose whatever tariff rates he deems desirable simply by declaring a national emergency would not only render our trade agreements program nugatory, it would subvert the manifest Congressional intent to maintain control over its Constitutional powers to levy tariffs.

As was said in *Falcon Sales Company* v. *United States,* 47 Cust. Ct. 129, 136, C.D. 2292, 199 F. Supp. 97, 102 (1961) presidential actions must be judged in the light of what the President actually *did,* not in the light of what he could have done. To this we would add, "and not in the light of what he *might do.*" Each Presidential proclamation or action under § 5(b) must be evaluated on its own facts and circumstances. To uphold the specific surcharge imposed by Proclamation 4074 is not to approve in advance any future surcharge of a different nature, or any surcharge differently applied or any surcharge not reasonably related to the emergency declared.

Proclamation 4074, far from fixing rates in disregard of congressional will, specifically provided, as noted above, "that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable

to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply."

Further, the surcharge was limited to articles which had been the subject of prior tariff concessions and, thus, to less than all United States imports. It resulted in a range of effective surcharge rates and duties. The surcharge rate on automobiles, for example, became 6.5% ad valorem. S. Rep. No. 92-437, 92d Cong., 1st Sess. 14 (1971).[25] With respect to some articles the surcharge could result in the precise statutory duty set by the Congress. If a prior concession had reduced the statutory rate by 10% ad valorem, the imposition of the 10% ad valorem surcharge would produce the statutory rate of column 1 in the Tariff Schedules. As Proclamation 4074 recognized, the duty rate after the surcharge might become that of column 2 for other articles. With respect to some other articles, the surcharge might result in a duty set by one of a series of earlier concessions following presidentially negotiated trade agreements. In the case of still other articles, the total duty under Proclamation 4074 might be less than that resulting from a rate set by Congress and different from that resulting from prior tariff concessions.

With respect to those articles on which no concession had been granted, the congressionally established rates remained untouched. And the limitation to "dutiable" articles meant that no duties were created on goods entitled to free entry under the statute. Far from attempting, therefore, to tear down or supplant the entire tariff scheme of Congress, the President imposed a limited surcharge, as "a temporary measure" (see footnote 4, supra) calculated to help meet a particular national emergency, which

[25] "When all exceptions to the 10-percent rule were taken into account, the effective rate of surcharge came down to 4.8 percent." Economic Report of the President 70 (1972). The amount collected under the surcharge was reported to be approximately $500 million. Wall St. Journal, July 9, 1974, at 3, col. 1.

is quite different from "imposing whatever tariff rates he deems desirable."[26]

Relationship to Other Statutes

Reliance by the Customs Court on *Youngstown Sheet & Tube,* as quoted above, is misplaced. We do not have here, as was the case in *Youngstown,* what the Customs Court described as "legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought to be obtained" by a Presidential Proclamation. The surcharge did not run counter to any explicit legislation. We know of no act, other than the TWEA, "providing procedures" for dealing with a national emergency involving a balance of payments problem such as that which existed in 1971.

Congress has provided numerous acts touching upon the regulation of imports. The Tariff Act of 1930 and its amendments, the Trade Agreements Act of 1934, and its amendments, and the Trade Expansion Act of 1962 all provide tariff-making authority to the President,[27] albeit with various limitations. Those trade acts were viewed by the Customs Court as indicating a congressional intent that such limitations should apply to any delegation of its tariff making authority.[28] Those acts, however, are

[26] A charge on imports will inherently produce revenue. As stated by the President, however, "The surcharge was not imposed to raise revenue but to provide the U. S. external position with some temporary protection." Economic Report of the President 70 (1972).

[27] For a review of congressional delegations of tariff regulating powers, see 7 *Vand. J. Transnat'l L.* 137, at 155 et seq. (1973).

[28] Appellant's argument below, that the surcharge was within the termination powers of the President under the TEA and the Tariff Act, would, if sustained, permit surcharges at any time the President wished. That contention should not, however, be permitted to influence consideration of the TWEA. The concept that Congress must surround every delegation with detailed limitations is at war with the flexibility imperative inherent in the delegation of emergency powers.

applicable to normal conditions on a continuing basis. The existence of limited authority under certain trade acts does not preclude the execution of other, broader authority under a national emergency powers act. Though § 5(b) of the TWEA does overlap the traditional framework of trade legislation, it is not controlling that some of the same considerations are involved. That is to be expected. All deal with foreign commerce. Congress has said what may be done with respect to foreseeable events in the Tariff Act, the TEA, and in the Trade Act of 1974 (all of which are in force) and has said what may be done with respects to unforeseeable events in the TWEA. In the latter, Congress necessarily intended a grant of power adequate to deal with national emergencies. It was error below to apply the same approach to determination of intent when Congress is legislating for normal conditions (where the grant is properly narrow) and when Congress is legislating for national emergency conditions (where the grant must be of greater breadth). We find it unreasonable to suppose that Congress passed the TWEA, delegating broad powers to the President for periodic use during national emergencies, while intending that the President, when faced with such an emergency, must follow limiting procedures prescribed in other acts designed for continuing use during normal times.

Relation to the Power Delegated and the Emergency Declared

A standard inherently applicable to the exercise of delegated emergency powers is the extent to which the action taken bears a reasonable relation to the power delegated and to the emergency giving rise to the action. The nature of the power determines *what* may be done and the nature of the emergency restricts the *how* of its doing, i.e., the means of execution. Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they

will not hesitate to review the *actions* taken in response thereto or in reliance thereon.[29] It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for courts to review his acts arising from that judgment.

It is clear that the surcharge herein nad, as its primary purpose, the curtailment, i.e., the regulation, of imports. What was sought was an offset to actions of our foreign trading partners which had led to loss of our favorable balance of trade and to a serious negative balance, as the President's address, supra note 4, made plain. Pressure exerted by the surcharge contributed to achievement of a multilateral agreement of major nations,[30] which included a realignment of currency exchange rates. As was indicated in *South Puerto Rico Sugar Co. Trad. Corp.* v. *United States,* 334 F.2d 622 (Ct.Cl. 1964), it is purpose, not form, which should govern judicial characterization of a charge on imports. Cf. *Moon* v. *Freeman,* 379 F.2d 382, 391 (9th Cir. 1967). A principal function and necessary effect of the import surcharge in Proclamation 4074 was to regulate imports. Section 5(b) delegated power to

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[29] That the courts stand ready to inhibit actions *not* reasonably related to the authority granted in the TWEA is illustrated by *Real* v. *Simon,* 510 F.2d 557 (5th Cir. 1975), wherein the Cuban Assets Control Regulations issued under the authority of § 5(b) of the TWEA had been employed to block a securities account in which a deceased Cuban national was alleged to have an interest. The court held such application of the regulations inconsistent with the legislation from which they receive their power and that the Secretary of the Treasury had exceeded his statutory authority in so interpreting and applying the provisions of the TWEA.

Though we agree fully with the Customs Court's statement that it is a "duty of the courts to hold the exercise of delegated congressional powers within the confines prescribed by the Congress," we think the performance of that duty should be limited to clear instances of the breach of such confines. Unlike *Real,* the present case is not such an instance. See also, *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), concerning review of executive actions under the Administrative Procedure Act.

[30] See note 6, supra.

"regulate importation." The relationship between the action taken and the power delegated was thus one of substantial identity.

The President's choice of means of execution must also bear a reasonable relation to the particular emergency confronted. In considering section 3 of the Tariff Act of 1890, which authorized the President, in non-emergency situations, to impose retaliatory measures at his discretion "for such time as he shall deem just," the Supreme Court, after noting the fact finding limitation normally involved in peacetime delegations, said in *Field* v. *Clark,* 143 U.S. 649, 691 (1892):

> [I]n the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of our people, against the unfriendly or discriminating regulations established by foreign governments, in the interests of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.

The "discriminating regulations • • • in the interests of their people" referred to in *Field* may be likened to the "unfair exchange rates," "unfair treatment" and "the unfair edge" which the President described in his address, supra note 4, as causing the United States "to compete with one hand tied behind her back" and as the "major reason why our trade balance has eroded."

That the surcharge herein had overtones of foreign relations and foreign policy seems self-evident. As the world has grown smaller and trade more complex, foreign exchange rates, international monetary reserves, balances of payments, and trade barriers have become increasingly intertwined, with trade barriers being used as tools in furtherance of foreign policy. See the Congressional findings which appeared in § 2 (50 USC App. 2401) of the Export Administration Act of 1969, 83 Stat. 841 (50 USC App.

2401-13). The Customs Court appreciated that the nature of the surcharge action converged with presidential representation of the United States in the "society of nations" and with the President's efforts to achieve "stability in the international trade position" of our country. The declared national emergency was premised on a prolonged decline in our country's international monetary reserves, the serious threat to our trade position, and our unfavorable balance of payments position. Unlike quotas and other forms of action, a surcharge can obviously be quickly imposed and removed, is not discriminatory among nations affected, and is administratively less complex.[31] Through its impact on imports, the surcharge imposed by Proclamation 4074 had a direct effect on our nation's balance of trade and, in turn, on its balance of payments deficit and its international monetary reserves. We conclude, therefore, that the President's action in imposing the surcharge bore an eminently reasonable relationship to the emergency confronted.

Constitutionality

It should be understood, in considering the constitutionality of the TWEA as here interpreted, that the President's imposition of the surcharge could not violate any individual's constitutional rights in foreign trade. No one has a vested right to trade with foreign nations. *Buttfield* v. *Stranahan,* 192 U.S. 470 (1904); *The Abby Dodge,* 223 U.S. 166 (1912); *Brolan* v. *United States,* 236 U.S. 216 (1915); *Weber* v. *Freed,* 239 U.S. 325 (1915); *Board of Trustees* v. *United States,* 289 U.S. 48 (1933). And no one has a legal right to the maintenance of an existing rate or

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[31] The relationship between quotas and surcharges, as counterfoils to balance of payments problems, is described in Vincke, "Trade Restrictions for Balance of Payments Reasons and the GATT: Quotas v. Surcharges," 13 *Harv. Int'l L.J.* 289, 312-13 (1972).

duty. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294 (1933). Nor are we faced here with denial or infringement, even indirectly, of any right arising from any of the Amendments to the Constitution, as were the courts, for example, in *Veterans & Reserv. For Peace In Vietnam* v. *Regional Com'r,* and *Teague* v. *Regional Commissioner of Customs,* supra note 16, wherein detention, under § 5(b), of publications sent from North Vietnam was upheld against a claim of violation of First Amendment rights, or in *Sardino* v. *Federal Reserve Bank of New York,* supra note 16, wherein blocking of property, under § 5(b), was found not to be a deprivation of property violative of the Fifth Amendment.

The Customs Court, as quoted above, perceived a constitutional flaw in § 5(b) of the TWEA if it were interpreted as permitting the surcharge herein, viewing such interpretation as a denial of the people's right to a government of separated powers, i.e., that Congress' delegation in § 5(b), unless restricted to "licensing," would be a violation of the "delegation doctrine." Whatever may be the current viability of that doctrine (see note 14, supra), we find no conflict therewith in the TWEA as applied to Proclamation 4074. The Supreme Court in *Hampton & Co.* v. *United States,* 276 U.S. 394 (1928), dealing with non-emergency conditions, found those delegations proper which laid down an "intelligible principle" under which the President was to act. We find that principle, as did the court in *Veterans & Reserv. For Peace In Vietnam* v. *Regional Com'r,* supra, in the express limitations that (1) § 5(b) of the TWEA shall become operative only in "time of war" or "any other period of national emergency declared by the President" (i.e., a congressional requirement that the President, before acting in peacetime, must find and declare the fact that a national emergency exists), and (2) that the power delegated therein shall be applied only to "property in which any foreign country or a national thereof has any interest."

It cannot be lightly dismissed that the TWEA is operative only during (war or) national emergencies,[32] which inherently preclude prior prescription of specific, detailed guidelines. Even in relation to *tranquil,* non-emergency conditions, the more modern view of the "delegation doctrine" was stated by the Supreme Court in *American Power Co.* v. *S.E.C.,* 329 U.S. 90, 105 (1946), in these words:

> The legislative process would frequently bog down if Congress were constitutionally required to appraise

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[32] We agree with the Customs Court that courts will not review the bona fides of a declaration of an emergency by the President. Judicial suspicion should not form a basis of decision. *Teague* v. *Regional Com'r of Customs, Region II,* supra note 16; *Sardino* v. *Federal Reserve Bank of New York,* supra note 16; *Werner* v. *United States,* 119 F. Supp. 894 (S. D. Cal. 1954), *aff'd,* 233 F.2d 52 (9th Cir.), *cert. denied,* 352 U.S. 842 (1956). For a discussion of the advisability of such judicial review see Recent Decisions, supra note 11, at 667 where, in commenting on this case, the suggestion appears that such review would avoid "linguistic and policy distorting difficulties." Though the Congress has amended the TWEA twice since 1933, it has not seen fit to attempt the definition of what constitutes an "emergency" thereunder, and has not seen fit to impose either pre-conditions or post-conditions on its declaration. We note that the TWEA is just one out of 470 provisions of Federal law which delegate emergency powers to the President. See S. Rep. No. 93-549, 93d Cong., 1st Sess. III (1973). For a discussion of judicial reluctance to hold that an emergency has in fact terminated, in the absence of a presidential or congressional announcement to that effect, see Garson & Miller, supra note 11, at 151-57. See also, Comment, "The United States Response to Common Market Trade Preferences and the Legality of the Import Surcharge," 39 *U. Chi. L. Rev.* 177, 232 (1971).

For post-action controls which Congress could apply to emergency powers, see, e.g., the reporting provisions in § 103 of the Mutual Defense Assistance Control Act of 1951, 65 Stat. 645 (22 USC 1611b(b)), and the similar provisions of § 122(b) of the Trade Act of 1974 (19 USC 2133(b)), supra note 15.

The long, continuing parade of emergencies of the last 30 years makes prophetic the dictum of the Ninth Circuit in *Bauer* v. *United States,* 244 F.2d 794, 797 (1957), that we may "grow used to them as the fittings of normal existence."

> beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations.

Clearly, Congress can be "constitutionally required to appraise beforehand the myriad situations" even less stringently when legislating with respect to the inherently unknown and unknowable problems which may accompany a future national emergency.

The need for prompt action, another essential feature of a national emergency, precludes the otherwise oft-provided requirement for prior hearings, extensive fact finding, Tariff Commission reports to the President, and the like. Emergencies, by definition, require a quick, decisive response. Of the three branches of government, only the Executive has a continuing, spontaneous capability for mounting such a response. Further, emergencies are expected to be shortlived.[33] As the court said in upholding

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[33] Though the surcharge itself was described by the President as a temporary measure, and though it was in effect less than five months, we note that Proclamation 4098, which terminated Proclamation 4074, did not terminate the declared emergency. So far as imposition of a surcharge is concerned, however, the failure to terminate the emergency has been rendered moot by Congressional enactment of § 122(a) of the Trade Act of 1974, Pub. L. No. 93-618 (Jan. 3, 1975), 88 Stat. 1978, 1987 (19 USC 2132), specifically requiring the President, within certain parameters, to impose a surcharge or quotas in response to balance of payments

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the constitutionality of § 5(b) in *Nielsen* v. *Secretary of the Treasury*, 424 F.2d at 843:

> Nevertheless, it is also true that it may be reasonable and hence valid for a government to take more drastic measures in time of emergency, *especially when they are reasonably limited in time*, than it would propose or justify as permanent legislation. See, e.g., *Yakus* v. *United States*, 321 U.S. 414, 441, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481 (1934); *Wilson* v. *New*, 243 U.S. 332, 37 S.Ct. 298, 61 L.Ed. 755, L.R.A. 1917 E, 938 (1917). [Emphasis added.]

That § 5(b) and Proclamation 4074 deal only with *foreign* goods also is of significance. The Supreme Court, though dealing with international relations and the sale of arms rather than with imports, and with normal rather than national emergency conditions, in *Curtiss-Wright Export Corp.*, supra, recognized the distinction between delegations of power in foreign and domestic affairs in these words (299 U.S. at 320):

> It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from

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problems. A surcharge imposed after Jan. 3, 1975 must, of course, comply with the statute now governing such action.

We draw no conclusions, regarding the existence of authority for Proclamation 4074 in 1971, from the specific grant of the surcharge authority spelled out in the Trade Act of 1974. Cf. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950).

statutory restriction which would not be admissible were domestic affairs alone involved.[34]

Congress, by delegating to the President in § 5(b) the power to regulate imports within the national emergency powers standard, has not succeeded in abdicating its constitutional power to regulate foreign commerce. It remains the ultimate decision maker and the fundamental reservoir of power to regulate commerce. It may, of course, recall or limit the delegated emergency power at any time. Throughout the 114 year life of the TWEA and its progenitors, Congress has repeatedly exercised its untrammeled plenary power over foreign commerce.

Exercise of the regulatory power by the President differs substantially from its exercise by the Congress.[35] Unlike congressional freedom of exercise, Presidential exercise is limited to actions consistent with the national emergency purpose of § 5(b). Further, the President, unlike Congress, is required to take a political step, the declaring of a national emergency, before acting. Finally, both Congress and the President are bound by the Constitution, but the President must also avoid action in conflict with prior governing statutes. *Youngstown Sheet and Tube,* supra, and *United States* v. *Guy W. Capps, Inc.,* 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955).

The mere incantation of "national emergency" cannot, of course, sound the death-knell of the Constitution. Nor can it repeal prior statutes or enlarge the delegation in § 5(b).

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[34] *Curtiss-Wright* was decided within a year after the decision in *Panama Refining,* relied upon by the Customs Court as requiring the application of rigid standards to the delegation in § 5(b). It may be noted that *Panama Refining* dealt with *domestic* affairs (National Industrial Recovery Act of 1933, 48 Stat. 195).

[35] We note that the Congress, in delegating the power over importation in § 5(b), elected to employ the same word "regulate." which the people employed in delegating the power over commerce to the Congress under the Constitution in 1789. For the reasons cited herein, we do not, of course, consider the delegations co-equal.

The declaration of a national emergency is not a talisman enabling the President to rewrite the tariff schedules, as it was not in this case. We agree, also, with the statement of the court in *Algonquin SNG, Inc.* v. *Federal Energy Administration,* 518 F.2d 1051, 1062 (D.C. Cir. 1975), *cert. granted,* 423 U.S. —— (1975) (No. 75-382), that: "Our laws were not established merely to be followed only when times are tranquil." The TWEA, which is among "our laws" and is designed specifically for non-tranquil times, was not before the court in *Algonquin.*[36] As we have noted, if *every* law applicable to tranquil times were required to be followed in emergencies, there would be no point in delegating emergency powers and no adequate, prompt means for dealing with emergencies.

The Executive does not here seek, nor would it receive, judicial approval of a wholesale delegation of legislative power. Nor do we find in § 5(b) the grant of the "unrestrained and unbridled" authority feared by the Customs Court. The courts continue to sit and remain prepared, as was the court in *Real,* supra note 29, to impede an unreasonable or ultra vires exercise of the power granted in § 5(b). We do not here sanction the exercise of an unlimited power, which, we agree with the Customs Court, would be to strike a blow to our Constitution. On the contrary, we find ourselves in agreement with this statement of the Court of Claims in *South Puerto Rico Sugar Co. Trad. Corp.* (334 F.2d at 632):

> [W]hen Congress uses far-reaching words in delegating authority to the President in the area of foreign

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[36] That court had before it only 19 USC 1862(b), originally enacted as § 7 of the Trade Agreements Extension Act of 1955 (69 Stat. 162, 166) and now found in the Trade Expansion Act of 1962, as amended. Though § 1862(b) refers to threats to "national security" it is among the permanent trade laws applicable to non-emergency situations and does not involve use of the authority delegated in the TWEA upon declaration of national emergency.

> relations, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. In a statute dealing with foreign affairs, a grant to the President which is expansive to the reader's eye should not be hemmed in or "cabined, cribbed, confined" by anxious judicial blinders. [Footnote omitted.]

Conclusion

The broad and flexible construction given to § 5(b) by the courts which have considered it is consistent with the intent of Congress and with the broad purposes of the Act. As was said by the Supreme Court in discussing the President's power to define "banking institution" under an earlier version of § 5(b): "The power in peace and war must be given generous scope to accomplish its purpose." *Propper* v. *Clark*, 337 U.S. 472, 481 (1949). Though such a broad grant may be considered unwise, or even dangerous, should it come into the hands of an unscrupulous, rampant President, willing to declare an emergency when none exists,[37] the wisdom of a congressional delegation is not for us to decide. As was said in *Norman* v. *B. & O. R. Co.*, 294 U.S. 240, 297 (1935), with respect to "gold clause"

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[37] The growth of power in the Executive has been phenomenal over the last 40 years. The risks inherent in a concentration of power in the Executive remain those feared by the Framers. *The Federalist*, Nos. 48-49 (Madison). Recent events have brought the question into wider public discourse. Whether Congress should devote more effort to defining, limiting or regaining powers previously delegated is not a matter within the jurisdiction of the courts. Whether the pendulum of power should now begin to swing further in the direction of the Congress is a matter of policy, reserved to the people and their elected representatives in the Congress. Absent a violation of the Constitution, or action contrary to statute, it is not grist for the mill of this court.

measures: "We are not concerned with their wisdom. The question before the Court is one of power, not of policy."

Congress, fully familiar with its own use of duties as a means of regulation, delegated to the President, in § 5(b) of the TWEA, the power to regulate importation during declared national emergencies by means appropriate to the emergency involved. Interpreted as having authorized the President's imposition of the specific surcharge in Proclamation 4074, as a reasonable response to the particular national emergency declared therein, the delegation in § 5(b) of the TWEA passes constitutional muster.

Accordingly, the President's action under review was within the power constitutionally delegated to him, and the judgment of the Customs Court that said action was ultra vires must be reversed.

REVERSED

UNITED STATES CUSTOMS COURT

YOSHIDA INTERNATIONAL, INC. *v.* UNITED STATES

Court No. 72-2-00314

Port of New York

[Judgment for plaintiff.]

(Decided July 8, 1974)

Before BOE, Chief Judge, MALETZ and RE, Judges.[1]

BOE, Chief Judge: The plaintiff has filed a motion for summary judgment challenging the validity of Presidential Proclamation 4074 promulgated August 15, 1971, which imposed a surcharge in the form of a supplemental duty in the amount of 10 percent ad valorem upon most articles imported into the United States from and after August 16, 1971. The merchandise involved herein—consisting of zippers—was imported from Japan and entered at the port of New York on August 17, 25 and 26, 1971. In addition to being assessed with duty at the rate of 23.5 percent ad valorem pursuant to item 745.72, Tariff Schedules of the United States, the merchandise in question was assessed with an additional duty of 10 percent ad valorem pursuant to item 948.00 which was added to the tariff schedules by Presidential Proclamation 4074.

The defendant has filed a cross-motion for summary judgment contending that Presidential Proclamation 4074 was lawfully authorized by (1) the "termination" authority delegated to the President by the Congress in section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351(a)(6)) and section 255(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1885(b)); and (2) the authority vested in the President by section 5(b) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 5(b)).

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[1] The three-judge panel in this case was designated by the chief judge upon application of the parties pursuant to section 108 of the Customs Courts Act of 1970 (28 U.S.C. 255) and rule 4.13 of this court.

Presidential Proclamation 4074 provides in relevant part (F.R. Doc. 71—12120):

> WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;
>
> WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;
>
> WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;
>
> WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;
>
> NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:
>
> A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.
>
> B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

C. To implement section B of this Proclamation, the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States:

SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES

Subpart C headnotes:

1. This subpart contains modifications of the provisions of the tariff schedules proclaimed by the President in Proclamation 4074.

2. Additional duties imposed—The duties provided for in this subpart are cumulative duties which apply in addition to the duties otherwise imposed on the articles involved. The provisions for these duties are effective with respect to articles entered on and after 12:01 a.m., August 16, 1971, and shall continue in effect until modified or terminated by the President or by the Secretary of the Treasury (hereinafter referred to as the Secretary) in accordance with headnote 4 of this subpart.

3. Limitations on additional duties—The additional 10 percent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate

item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

4. For the purposes of this subpart—

(a) Delegation of authority to Secretary—The Secretary may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States.

• • • • • • •

(c) Authority to prescribe rules and regulations—The Secretary is authorized to prescribe such rules and regulations as he determines to be necessary or appropriate to carry out the provisions of this subpart.

5. Articles exempt from the additional duties—In accordance with determinations made by the Secretary in accordance with headnote 4(a), the following described articles are exempt from the provisions of this subpart:

• • • • •

Item	Article	Rates of duty 1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements	10% ad val.... (See headnote 3 of this subpart.)	No change.

D. This Proclamation shall be effective 12:01 a.m., August 16, 1971.

• • • • • • •

I

The courts on frequent occasions have considered the question relating to the right of the legislative branch of government to delegate the powers vested in it by the Constitution to the executive branch. It would be only time-consuming to review these many decisions at length. Suffice it to say that the Congress cannot divest itself of the legislative powers with which it has been constitutionally invested. See e.g. *Field* v. *Clark,* 143 U.S. 649 (1892); *Hampton & Co.* v. *United States,* 276 U.S. 394 (1928). As stated in *Field* v. *Clark, supra,* p. 692, this principle is

> • • • universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. • • •

Again, the Supreme Court in *Schechter Corp.* v. *United States,* 295 U.S. 495 (1935), reiterated this principle in stating that the Congress cannot delegate its legislative authority to others to exercise the unfettered discretion to make whatever laws may be thought to be needed or advisable for the rehabilitation and expansion of trade or industry.

As domestic problems and international relations have become more complex throughout the course of the history of our country, it concurrently has been recognized that our three branches of government are coordinated parts of one government, and that these partners in purpose and objective must utilize, as needed, the assistance and efforts of the others in carrying forth the powers, duties, and responsibilities with which they have been initially invested. Thus, the legislative branch has delegated to the executive branch the powers, *inter alia,* to determine

fair and just rates in interstate commerce, to proclaim an embargo on the sale of arms and munitions to foreign nations, to change rates of duties under prescribed procedures. *Field* v. *Clark, supra; United States* v. *Curtiss-Wright Corp.,* 209 U.S. 304 (1936); *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U.S. 194 (1912); *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935).

No inflexible standard can be applied in ascertaining the degree of assistance that one branch of government might give to another. As pointed out in *Hampton & Co.* v. *United States, supra,* p. 406:

> • • • In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

Although in its early history Congress itself established tariff rates through legislative enactment, the passing of time has seen the delegation of much of this authority to the President, subject, however, to prescribed standards and guidelines enunciating an "intelligible principle" to which conformance is required. *Hampton & Co.* v. *United States, supra,* p. 409. In *Norwegian Nitrogen Co.* v. *United States,* 228 U.S. 294, (1933), the Court recognized the foregoing stating:

> • • • Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. • • •

The Tariff Act of 1930, as amended, and the Trade Expansion Act of 1962 were enacted by the Congress in full appreciation of the inability of the legislative branch to singly supervise or administer that comprehensive power vested in it by article I, section 8 of the Constitution which

provides that:

> The Congress shall have power to lay and collect taxes, duties, imports and excises • • •.

Congress has delegated by these Acts broad and general authority to the President to enter into negotiations with foreign nations to the end that bilateral trade agreements might be effected by the contracting parties. As a corollary power, the President has been further authorized to proclaim such modifications with respect to existing duties or other import restrictions as may be required to carry out the provisions of any particular negotiated trade agreement. Inasmuch as a trade agreement is not self-executing the provisions or modifications contained therein must be proclaimed by the President in order that they have the effect of domestic law.

Thus, section 350 of the Tariff Act of 1930, as amended (19 U.S.C. 1351), provides in part:

> (a)(1) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

> (A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof: *Provided,* That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.
>
> (B) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

Similar provisions were again included by the Congress in the enactment of the Trade Expansion Act of 1962 (19 U.S.C. 1801 *et seq.*). Section 201 of that Act (19 U.S.C. 1821) provides:

> (a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 1801 of this title will be promoted thereby, the President may—
>
> (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
>
> (2) proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.

In the same manner as the President has been authorized and given discretion to enter into bilateral trade agreements and to implement them by proclamation, he likewise has been given authority to terminate trade agreements previously negotiated.[2]

Under the so-called escape clause, section 351 of the Trade Expansion Act of 1962 (19 U.S.C. 1981), the President may increase duties on articles causing or threatening injury to the United States, after an affirmative finding by the Tariff Commission and compliance with other procedures. Under section 252 of the Trade Expansion Act of 1962 (19 U.S.C. 1882), the President may increase duties or suspend trade agreement concessions to retaliate against unjustifiable import restrictions, non-tariff barriers, etc., upon compliance with stated procedures related to public hearings and the presentation of recommendations concerning foreign import restrictions. Under the so-called flexible tariff provision, section 336 of the Tariff Act of 1930, as amended (19 U.S.C. 1336), the President may, after appropriate finding by the Tariff Commission proclaim increased duties to equalize dif-

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[2] Section 2(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1352(b)) provides:

> (b) Every foreign trade agreement concluded pursuant to this part shall be subject to termination, upon due notice to the foreign government concerned, at the end of not more than three years from the date on which the agreement comes into force, and, if not then terminated, shall be subject to termination thereafter upon not more than six months' notice.

Section 255(a) of the Trade Expansion Act of 1962 (19 U.S.C. 1885(a)) similarly provides:

> (a) Every trade agreement entered into under this subchapter shall be subject to termination or withdrawal, upon due notice, at the end of a period specified in the agreement. Such period shall be not more than 3 years from the date on which the agreement becomes effective. If the agreement is not terminated or withdrawn from at the end of the period so specified, it shall be subject to termination or withdrawal thereafter upon not more than 6 months' notice.

ferences in cost of production. These statutes, in short, authorize the President to increase duties in certain situations that are not here applicable, provided that specific procedures are followed.

Finally, the President has been delegated authority to "terminate, in whole or in part," prior proclamations which have implemented the provisions of foreign trade agreements. And it is this power, defendant contends, which authorized the President to impose the additional 10 percent duty here in issue.

In this connection, it is to be noted that section (B)(1) of Presidential Proclamation 4074 provides:

> I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

There can be no doubt that this phraseology, viewed in its customary and ordinary usage, is intended as the exercise of the power of termination.

The statutes are brief and concise in delineating this prerogative. Section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351(a)(6)) provides:

> The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Similarly, section 255(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1885(b)) provides:

> The President may at any time terminate, in whole or in part, any proclamation made under this subchapter.

Against this background, the question is whether the President, in the assessment of the supplemental duty pro-

vided for in Presidential Proclamation 4074, acted beyond the authority so delegated to him by the Congress.

Viewing this Proclamation in the light of the statutory authority delegated by the Congress, it would appear that it is hybrid in character. Although an effort is made to "terminate" and "suspend" prior proclamations in the same breath, presumably in the hope that some justifying authority might be thereby synthesized, there can be little doubt that the basic authority and justification for the President's action therein was predicated on the termination powers conferred by section 350(a)(6) of the Tariff Act and section 255(b) of the Trade Expansion Act.[3]

We conclude that the authority granted by statute to "terminate, in whole or in part, any proclamation" does not include the power to determine and fix unilaterally a rate of duty which has not been previously legally established. On the contrary, the "termination" authority, as statutorily granted, merely provides the President with a mechanical procedure of supplanting or replacing existing rates with rates which have been established by prior proclamations or by statute. Relevant thereto is *United States* v. *American Bitumuls & Asphalt Co.*, 44 CCPA 199, C.A.D. 661, 246 F.2d 270 (1957), *cert. denied*, 355 U.S. 883 (1957). In that case, the collector of customs, pursuant to Presidential Proclamation 2901, assessed a duty of ½ cent a gallon on imported petroleum products, which proclamation the importer claimed to be invalid in that it increased the rate of duty in excess of the amount of 50 percent as provided by section 350(a)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1351 (a)(2)). In determining such a 50 percent increase limitation not to be applicable to proclamations terminating other proclamations, our appellate

[3] Thus, the General Counsel of the Treasury in his opinion with respect to the legal basis for the imposition of the surcharge predicated the action of the President in making this assessment on the termination authority. Op. General Counsel (Treas. Dept.) No. 822, Sept. 21, 1971.

court stated (44 CCPA, p. 205, 246 F.2d, p. 275):

> There is a logical reason for placing a limitation on the tariff changes which may be effected by proclamations giving effect or carrying-out trade agreements but not on those which merely terminate other proclamations, since the latter can do no more than restore rates which have already been legally established, and are thus inherently limited. [Emphasis in original.][4]

General headnote 4(d) of the tariff schedules codifies this principle and provides clear legislative direction with respect to the effect resulting from the termination of a proclamation:

> [W]henever a proclaimed rate is terminated or suspended, the rate shall revert, unless otherwise provided, to the next intervening proclaimed rate previously superseded but not terminated or, if none, to the statutory rate.

This headnote is clarified by the following statement in the *Tariff Classification Study Submitting Report* (Nov. 15, 1960), p. 17:

> Headnote 4 relates to the effect, in each of the two numbered rate columns of the tariff schedules, of changes in rates of duty by legislative enactment and by proclamation of the President pursuant to delegated authority under the trade-agreements legislation and section 336 of the Tariff Act of 1930 (the so-called flexible-tariff provision). This headnote explicitly expresses the difference in legal effect between statutory (amended) rates of duty and proclaimed (modified) rates of duty. A permanent statutory amendment of a rate of duty supersedes and termi-

[4] See also *United States* v. *Metroplitan Petroleum Corp.*, 42 CCPA 38, C.A.D. 567 (1954); *Barclay & Company, Inc.* v. *United States*, 47 CCPA 133, C.A.D. 745 (1960).

nates the existing rate, whereas a proclaimed (modified) rate supersedes but does not terminate the existing rate of duty. For example, if an original statutory rate of 30 percent ad valorem applicable to an article is "modified" to 40 percent by proclamation issued pursuant to section 336 and thereafter is modified to 20 percent by proclamation under the trade-agreements legislation, the original rate of 30 percent was superseded but not terminated by the 40-percent rate and the 40-percent rate was superseded but not terminated by the 20-percent rate. The "modified" rate of 40 percent proclaimed pursuant to section 336 would be reflected in both rate columns, whereas the "modified" rate of 20 percent proclaimed pursuant to section 350 would be reflected only in column numbered 1. On the other hand, if the Congress should enact permanent legislation changing the 20-percent rate to 15 percent, such amendment would terminate and supersede the previous rates of duty in both rate columns unless otherwise specified in the amending statute.

General headnote 4(d) treats with the situation where a proclaimed rate is terminated or suspended. If in the example previously given, the 20-percent rate proclaimed pursuant to the trade-agreements authority were terminated or suspended, the new rate would become 40 percent since this is the next intervening proclaimed rate previously superseded but not terminated. If the 40-percent rate should thereafter be terminated or suspended the rate would revert to the statutory rate of 30 percent. [Emphasis added.]

Defendant contends, however, that the phrase in general headnote 4(d) "unless otherwise provided" indicates recognition of a discretionary authority to establish a new intermediate rate in conjunction with the statutory authority to "terminate * * * in part." We cannot agree.

In our view that phrase is nothing more than an exception to the provision contained in headnote 4(d) fixing the order of rate reversion resulting from a termination proclamation. More specifically, the phrase "unless otherwise provided" gives the President discretionary authority when terminating a proclamation to specify a rate established in a specific previous proclamation other than the next intervening proclamation and thus avoid an automatic reversion to the next intervening proclaimed rate. In other words, the phrase "unless otherwise provided" contemplates only the exercise of Presidential discretion to preclude the order of reversion set forth in general headnote 4(d).

This court likewise is unable to accept the further argument propounded by the defendant—that the maxim of statutory construction providing that a broader authority includes the lesser—is applicable to the case at bar. In reference thereto, the defendant suggests that if the President has the power to terminate all prior proclamations, thus bringing into effect the statutory rate, *a fortiori,* he has the power to impose a new rate, higher than the terminated rate, yet lower than the statutory rate. Such a conclusion is fallacious. The power granted to the President with respect to the adjustment of rates pursuant to his termination authority is limited to the use of termination proclamations (1) to increase rates to the highest level, *i.e.,* the statutory rate, or (2) to raise or lower rates to conform to rates which have been established by a prior proclamation. In either of these instances, the rates, to which conformance may be sought, have been previously established either by the Congress (statutory rate) or by a bilateral negotiation embodied in a trade agreement pursuant to statutory authority. In short, the power to fix a new and independent rate requires a greater grant of power than that delegated to the President by the termination authority. Pursuant to the latter authority, the President is constrained, with the exception noted above, to follow a fixed order of reversion established by the Congress, "rest-

ing'' only on those rates previously established. Indeed, should the establishment of new and independent rates be considered a lesser power included in the termination authority, all concession rates previously established through bilateral negotiation could be totally ignored thereby giving the President complete and broad discretion to impose any rate whatsoever up to the statutory rate. We fail to find wherein the statutes evidence an intention on the part of the Congress to grant the President such unrestrained unilateral authority.

Nor can we accept the construction urged by the defendant that the phrase ''terminate • • • in part'' as distinguished from "terminate in whole" authorizes the establishment of new intermediate rates. It is manifest that the phrase "terminate • • • in part'' can be given no other meaning than that which the individual words signify. Thus, the word "terminate" signifies ''the act of ending something, implying a final and conclusive act, a complete cessation of effect • • •." *Falcon Sales Company* v. *United States*, 47 Cust. Ct. 129, 135, C.D. 2292, 199 F. Supp. 97, 102 (1961). Its meaning is not interchangeable with the word "suspend'' which "signifies the act of stopping for a time, implying a temporary inoperative condition." *Ibid.* In light of these considerations, no rationalization will permit an implication to be derived from the phrase "terminate • • • in part" that existing proclaimed rates can be suspended and temporarily supplanted by new rates determined solely by the President. The discretionary authority contained in the provision "terminate, in whole or in part" is twofold: (1) to nullify and bring to an end an entire proclamation; and (2) to specify the extent to which a prior proclamation is terminated, thereby permitting a portion thereof to remain in effect.[5]

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[5] See Presidential Proclamation 3762, 81 Stat. 1076 (1967), by the terms of which Presidential Proclamation 3455 was terminated in whole and Presidential Proclamation 3458 was terminated to the extent that it modified Presidential Proclamation 3455.

The legislative history likewise indicates that the authority delegated to the President "to terminate, in whole or in part, any proclamation" was not intended by the Congress to grant him the power to determine and fix unilaterally an intermediate rate of duty which had not been previously legally established. It is to be noted in this connection that the Administration's draft bill for the Trade Expansion Act of 1962—H.R. 9900—contained a proposed section 244(b) to give the President the authority to establish such new intermediate rates as an incident to the power to terminate in part. See *Hearings before the House Committee on Ways and Means on H.R. 9900—Trade Expansion Act of 1962* (87th Cong., 2d Sess., 1962, p. 17) hereafter referred to as ''House Hearings"). The proposed section 244(b) provided (House Hearings, p. 17):

> (b) The President may at any time terminate, in whole or in part, any proclamation issued under this title. Termination in part of a proclamation reducing a rate of duty may include the proclamation, as required or appropriate to carry out any trade agreement under this title or any predecessor Act, of a rate of duty higher than such reduced rate but not higher than the rate which would have been applicable if the proclamation had been terminated in whole.

An accompanying section-by-section analysis of H.R. 9900 prepared by the executive branch contains the following statement with respect to proposed section 244(b) (House Hearings, p. 37):

> The first sentence of subsection (b) is substantially identical to section 350(a)(6) of the Tariff Act of 1930, as amended, and provides that the President may at any time terminate, in whole or in part, any proclamation issued under title II. The second sentence is a new technical provision which permits the President, when terminating in part a proclamation reducing a rate of duty, to establish a new rate of duty at any

point in the range above the reduced rate but no higher than the rate which would have been applicable if the proclamation had been terminated in whole. Such authority would be of use in negotiations under article XXVIII of the General Agreement on Tariffs and Trade (hereinafter referred to as GATT) where it is occasionally desirable to agree to make increases in rates of duty.

In addition, a memorandum prepared by the Tariff Commission for the Ways and Means Committee comments on proposed section 244(b), as follows (House Hearings, pp. 951-2):

> 3. Termination of Proclamations.—Section 244(b) of the bill provides that the President may at any time terminate, in whole or in part, any proclamation issued under Title II of the bill; i.e., proclamations prescribing continuance, reduction, or elimination of duties or other import restrictions, or continuance of existing duty-free or excise treatment, required or appropriate to carry out a trade agreement negotiated under the proposed authority, and proclamations prescribing treatment to "adjust" imports to protect the national security. This section further provides that termination in part of a proclamation reducing a rate of duty may include—
>
> > the proclamation, as required or appropriate to carry out any trade agreement under this title [i.e., Title II of the bill] or any predecessor Act, of a rate of duty higher than such reduced rate but not higher than the rate which would have been applicable if the proclamation had been terminated in whole.
>
> The provision regarding partial termination of a proclamation issued under title II raises several questions. This authority to proclaim an intermediate rate

> of duty seems to be clearly related only to the new grant of authority in title II of the bill.[1] Inasmuch as title II does not contain authority to negotiate increases in rates of duty, it is not clear how a basis could be laid in a trade agreement entered into under title II for the proclamation of the aforementioned higher intermediate rate of duty.

From the foregoing, it seems clear that it was the executive branch's intent in proposing section 244(b) to give the President authority—which he did not previously have—to establish new intermediate rates as an incident to the power to terminate in part. It is significant, however, that the second sentence of proposed section 244(b) was eliminated when the Ways and Means Committee reported H.R. 11970 as a clean bill which the Congress subsequently enacted. The fact that Congress considered granting the President new authority to establish new, intermediate rates as an incident to the power to terminate in part, and rejected it, indicated that Congress concluded that the President should not have power to choose rates which never existed in prior statutes or proclamations.

Additionally, it is to be observed that the Senate adopted an amendment to H.R. 11970, the Trade Expansion bill, which would have added a new section 353, as follows (108 Cong. Rec. 19875 (1962)):

> Notwithstanding any other provision of law, the President may, when he finds it in the national inter-

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[1] The continuation of the existing proclaiming authority in section 350 is provided for separately in section 248(a)(1) of the bill. It will be noted that section 248(a)(1) does not include a provision with respect to proclaiming intermediate rates of duty. Furthermore, section 248(a)(1) expressly continues the authority contained in the present section 350(a)(6) to terminate, in whole or in part, any proclamation of trade agreements entered into pursuant to section 350, a fact which further militates in favor of reading section 244(b) of the proposed legislation as relating only to proclamations issued to carry out trade agreements entered into under the proposed legislation.

est, proclaim with respect to any article imported into the United States—

(1) the increase of any existing duty on such article to such rate as he finds necessary,

(2) the imposition of a duty on such article (if it is not otherwise subject to duty) at such rate as he finds necessary, and

(3) the imposition of such other import restrictions as he finds necessary.

It is obvious that had this provision been enacted into law, it would have authorized a surcharge such as provided for in Presidential Proclamation 4074. However, the provision was deleted by the House-Senate Conference Committee. Conference Report No. 2518 (87th Cong., 2d Sess. (1962) (2 U.S. Code Cong. & Adm. News (1962), p. 3142)). Deletion of the provision not only demonstrates that Congress was unwilling to grant such expansive discretionary power to the President, but also indicates a probable recognition by Congress that such an unrestrained grant of authority to increase existing duties and impose nonexisting duties may well have been an invalid delegation of legislative power vested solely in the Congress by the Constitution.[6]

Nor can this court agree with defendant's contention that prior Presidential proclamations serve as a precedent for the President's alleged authority to establish interme-

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[6] Senator Byrd, Chairman of the Senate Finance Committee, reviewing in the Senate the actions of the conferees with respect to H.R. 11970, indicated that several factors led to the rejection of section 353 in conference (108 Cong. Rec. 22182 (1962)):

> • • • Section 353 was a sword which could cut two ways: First, one problem was that there was no procedure prescribed for ascertaining the facts and, second, *the other problem was that the Congress did not retain the same opportunity for review as the other sections of the bill provide.* [Emphasis added.]

diate rates. Presidential Proclamation 2901, 64 Stat. A427 (1950), cited by the defendant, provided for a reduction during the period of one year in the quantity of potatoes subject to the reduced tariff quota in the General Agreement on Tariffs and Trade (GATT). By reducing the quantity of potatoes subject to the quota rate, the Presidential Proclamation did nothing more than expose the possibility of more imported potatoes to the higher statutory rate. Unlike the effort to establish new supplemental intermediate rates as proposed by Presidential Proclamation 4074, Presidential Proclamation 2901 changed neither the concession rate nor the statutory rate. No intermediate nor supplemental duty was established whatsoever.

Defendant cites Presidential Proclamation 2929, 65 Stat. c12 (1951), in further support of its assertion that the President has established new intermediate rates in his exercise of the "termination" authority. Examination of the history with respect thereto discloses that the Torquay Protocol, a new trade agreement between participating nations, provided for an increase on certain gloves from the 25 percent duty (the previous rate established by the GATT (T.D. 51802, schedule XX, pp. 162-3)) to a rate of 35 percent (T.D. 52739. p. 212). Presidential Proclamation 2929, in proclaiming the new trade agreement rates, specifically excepted in part I certain items and provided in part III that all prior proclamations "are hereby terminated to the extent" that the items therein specified are modified by the Torquay Protocol. See 65 Stat. c17-c18.

In the opinion of this court, Presidential Proclamation 2929 clearly was predicated on the authority to proclaim trade agreement rates as provided by section 350(a)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. 1351(a)(1)(B)). This conclusion is confirmed by the decision of the appellate court in *United States* v. *Aris Gloves, Inc.*, 48 CCPA 126, C.A.D. 777 (1961). In determining therein that public notice of intention to negotiate the trade agreement (Torquay Protocol) rates relating to

gloves had been properly given, as required by statute, the court must necessarily have recognized that the new rate was a modification agreed upon as a part of the Torquay Protocol and given domestic effect by the proclamation of the new trade agreement rates. Since a statutory requirement of notice is not required in a unilateral act of termination, a decision of the appellate court, would have been needless had the new rates in question been established under the termination authority. Hence, while Presidential Proclamation 2929 was used as the vehicle by which prior rates relating to certain gloves were "terminated in part," the exercise of the termination authority was merely ancillary to the primary purpose and effect of the proclamation—which was to give domestic legal effect to the new rates established by the Torquay Protocol and thus cause these new rates to apply to those gloves, the prior rates of which had been terminated in part.

Accordingly, it is the opinion of this court that Presidential Proclamation 4074 cannot be sustained by the termination authority and that the Proclamation, in fact, arrogated unto the President a power beyond the scope of any authority delegated to him by the Congress. The assessment of the surcharge constituted an affirmative unilateral act on the part of the Executive which cannot be viewed nor rationalized in any way other than an unauthorized imposition of a new and additional duty. Indeed, to invest the President with the powers contended by the defendant would render the proceedings and guidelines enumerated in other tariff legislation meaningless. See *United States* v. *Schmidt Pritchard & Co.*, 47 CCPA 152, C.A.D. 750 (1960), *cert. denied*, 364 U.S. 919 (1960).

II

With respect to defendant's contention that the Trading with the Enemy Act (50 U.S.C. App.) serves as further authority for the validity of Presidential Proclamation 4074, the plaintiff submits that no consideration should be

given thereto inasmuch as the Proclamation does not specifically refer to this Act as a part of its statutory authority.

To sustain the plaintiff's contention would be to place an unwarranted limitation upon judicial review. Presidential Proclamation 4074 does not seek to designate the Tariff Act of 1930, as amended, and the Trade Expansion Act of 1962 as the sole sources of authority. On the contrary, the Proclamation refers to the President as "acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA [Trade Expansion Act] * * *." This court, accordingly, has considered the argument presented by the defendant with respect to the authority that may have been delegated to the President by the provisions of the Trading with the Enemy Act. *Toledo, P. & W. R. R.* v. *Stover*, 60 F. Supp. 587 (S.D. Ill. 1945).

It has been long recognized that war, itself, effects a suspension of commercial intercourse between belligerent nations. However, changes in economic conditions as well as changes in the evolving philosophy of man have dictated that legislative modifications be enacted in lieu of the inflexible rule of law terminating all commercial intercourse between warring nations existing at common law and in the law of nations. In so doing, controls have been provided through legislative enactment with respect to authorized foreign trade and intercourse which prior thereto would have been prohibited.

The present Trading with the Enemy Act may be said to have its roots in the Act of Congress of July 13, 1861, 12 Stat. 255, 275.[7] Pursuant thereto the President through

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[7] Section 5 of the 1861 Act provided:

> [A]ll commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other

(footnote continued on following page)

the Secretary of the Treasury, was authorized in his discretion to "license and permit commercial intercourse" with all or any part of the States in insurrection.

The system of licensing, thus first authorized during the Civil War, again became an integral part of the Trading with the Enemy Act of 1917. The provisions thereof prohibited any trade with the enemy "except with the license of the President." 40 Stat. 412, section 3(a).

It will be noted that in each of the foregoing legislative enactments the words "license" and "permit" were used to describe the form of regulation delegated to the President. From the congessional committee hearings,[8] reports[9] and debates on the Trading with the Enemy Act of 1917,[10] as well as from the statement voiced by the Secretary of the Treasury,[11] it appeared, however, that the statutory

(footnote continued from preceding page)

> parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to or from such State or section, be forfeited to the United States: *Provided, however,* That the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury.

[8] Hearings on H.R. 4704, House Comm. on Interstate and Foreign Commerce, 65th Cong., 1st Sess., May 29, 31 and June 4, 1917; Hearings on H.R. 4960, Senate Subcomm. of Comm. on Commerce, 65th Cong., 1st Sess., July 23, 24, 25, 27, 30 and August 2, 1917.

[9] H. Rep. No. 85, 65th Cong., 1st Sess., June 21, 1917; S. Rep. No. 111, 65th Cong., 1st Sess., August 23, 1917; H. Rep. No. 155, 65th Cong., 1st Sess., September 21, 1917.

[10] 55 Cong. Rec., 65th Cong., 1st Sess., pp. 4840-4879, 4907-4930, 4968-4989, 6949-6958, 7007-7025 (1917).

[11] Letter from Secretary William G. McAdoo to Senator Ransdell, dated September 11, 1917, 55 Cong. Rec., 65th Cong., 1st Sess., p. 7013. See also comments of Senators Reed and Ransdell, 55 Cong. Rec., pp. 7012-7014.

provisions afore referred to did not provide sufficient authority to the President to adequately control imports—a power considered essential during a time of war. Therefore, the Congress, in enacting the Trading with the Enemy Act of 1917, added section 11 which gave broad and expansive powers to the President to control imports during World War I. 40 Stat. 422, section 11.[12]

The significance of the afore-quoted section, insofar as it relates to the immediate question presented to us for determination, is found in the fact that the extremely broad power given to the President thereunder to regulate imports terminated at the end of World War I and was never reenacted in subsequent amendments.[13]

In 1933 during the domestic crisis occasioned by the depression of that decade, the President's authority to act under section 5(b) was extended to "any other period of national emergency declared" by him, and he was given the power "by means of licenses or otherwise" to regulate "transfers of credit between or payments by banking institutions." 48 Stat. 1.

In 1941 the Act was amended in order to give the President more flexibility over alien property, 55 Stat. 839.

[12] Section 11, above referred to, provided:

> Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation any article or articles mentioned in such proclamation except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: *Provided, however,* That no preference shall be given to the ports of one State over those of another.

[13] The license powers accorded to the President terminated at the close of World War I and became effective again automatically at the outbreak of World War II. On the other hand, section 11 and the broad powers included therein, were of a temporary nature and were terminated at the close of World War I. See *Markham* v. *Gabell,* 326 U.S. 404 (1945).

Again, the mode of regulation authorized by the statute included a system of licenses.

In support of its contention the defendant places specific reliance on section 5(b) of the present Trading with the Enemy Act (50 U.S.C. App. 5(b)) providing:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.
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> • • • • • • •

Recognizing that a declaration of a national emergency is within the discretion of the President and that a determination as to the need or desirability of affirmatively exercising such authority is not a judicial function, this court will refrain from offering any gratuitous comment as to the existence or nonexistence of the national emergency declared in President Proclamation 4074. *Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106 (2d Cir. 1966); *Werner* v. *United States*, 119 F. Supp. 894 (S.D. Cal. 1954), *aff'd* 233 F. 2d 52 (9th Cir. 1956).

The plaintiff urges that the regulatory powers conferred upon the President by the Trading with the Enemy Act are directed against and applicable only to enemy countries and against property having an "enemy taint." Such a construction with respect to the purview of this Act is too restrictive. The statute relates to "• • • any property in which any foreign country or a national thereof has any interest, • • •." The usage of the word "any" negates such a limited construction. The successive amendments to the Act likewise indicate the intent of the Congress to expand its scope rather than to narrow its application. *United States* v. *Broverman*, 180 F. Supp. 631 (S.D.N.Y. 1959).

The gravamen of the defendant's contention appears to rest on the construction of the words contained in section 5(b)(1)(B), "• • • regulate • • • importation • • • of • • • any property in which any foreign country or a national thereof has any interest, • • •." Pointing with particularity to this statutory language, the defendant further contends that Congress has, in effect, delegated to the President the regulatory power inherent in and originating from its constitutional authority to regulate foreign commerce. Citing *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940), as authority, the defendant argues that it necessarily follows that the imposition of the surcharge in the form of a supplemental duty is thus within the authority delegated to the President by section 5(b)(1)(B). We do not agree that the *McGoldrick* case or the decisions referred to therein justify the application of this reasoning to the case at bar.

In acknowledging the principle that the laying of duties on imports, although an exercise of the taxing power, is also an exercise of the power to regulate foreign commerce, Mr. Justice Stone in the *McGoldrick* case cites *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 88 (1824); *Hampton & Co.* v. *United States*, 276 U.S. 394 (1928) and *Board of Trustees* v. *United States*, 289 U.S. 48 (1933).

Each of these decisions affords us an incisive insight with respect to the relationship existing between the powers to tax and lay duties on imports and the power to regulate foreign commerce as conferred upon the Congress by the Constitution.

In the case of *Gibbons* v. *Ogden, supra,* Mr. Chief Justice Marshall stated:

> We must first determine whether the act of laying "duties or imposts on imports or exports," is considered, in the constitution, as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts and excises;" and before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. • • •

Again, in *Hampton & Co.* v. *United States,* the Supreme Court, in rejecting the contention that the sole constitutional purpose in providing the Congress with the power to impose customs duties was to raise revenue, stated (*supra,* pp. 412-413):

> So long as the motive of Congress and the effect of its legislative action are to secure revenue for the

> benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate Congressional action. As we said in the *Child Labor Tax Case,* 259 U.S. 20, 38: "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive." And so here, the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, cannot invalidate a revenue act so framed. • • •

Similarly, we find a further reiteration of the constitutional principle first enunciated in the case of *Gibbons* v. *Ogden, supra,* in the case of *Board of Trustees* v. *United States,* wherein the Supreme Court stated, *supra,* p. 58:

> It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. *Gibbons* v. *Ogden, supra,* p. 201. It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons* v. *Ogden, supra,* p. 202. • • •

From the foregoing decisions, it is well established that the constitutional grants of power to lay and collect taxes and duties on imports and the power to regulate foreign commerce are separate and independent grants of authority distinct from each other. Although the primary

purpose of the power to tax and impose duties may be to obtain revenue, it may also serve as a regulatory measure.

Similarly, the imposition of a duty on imports may constitute, *inter alia,* an exercise of the constitutional power to regulate foreign commerce. In connection with this latter power, however, it must be borne in mind that the extent and mode of any regulatory authority delegated by the Congress must be determined in each individual instance by the statutory language and an examination of all the surrounding circumstances. It cannot be said that the investiture of a power to "regulate" necessarily includes, *per se,* the power to levy duties. The necessity of determining the scope and extent of any delegated regulatory power has been recognized by the Supreme Court in *Hamilton* v. *Dillin,* 88 U.S. (21 Wall.) 73 (1875), wherein it was stated (p. 92):

> [I]t is conceded that in many cases the power to make rules and regulations on a particular subject is a limited power, having respect to mode and form, and time and circumstances, and not to substance. But it must also be conceded that in other cases the power is much more extensive and substantial. • • •

The decisions in the cases of *Gibbons* v. *Ogden; Hampton & Co.* v. *United States; Board of Trustees* v. *United States* and *McGoldrick* v. *Gulf Oil Corp., supra,* relate to the imposition of duties by the Congress as an exercise of its plenary constitutional powers to lay and collect taxes and duties and to regulate foreign commerce. The significance of the *McGoldrick* decision rests in its determination that a state regulation (tax) on imports, which previously had been the object of congressional regulatory attention, cannot infringe on the constitutional power vested in the Congress to regulate commerce. These issues, however, are not involved herein. The sole question before us in the case at bar concerns the extent to which the Congress has delegated the power of "regulation" to the Executive.

In determining whether section 5(b) of the Trading with the Enemy Act serves as authority for the imposition of an additional duty, we must accord the word "regulate" the sense in which the Congress intended it to be used. The meaning of a statute or of the words therein is not to be derived from any single section, but from all of the parts comprising the entirety and, in turn, from their relationship to the ultimate purpose sought to be attained. Nor can the Act be read intelligibly if the eye is closed to the purpose and objectives evidenced in complementary statutes or in the known temper of legislative intent or historical usage. For legislation delegating restrictive regulatory authority cannot operate, merely upon the declaration of an emergency, to the exclusion of other legislative acts providing procedures prescribed by the Congress for the accomplishment of the very purpose sought to be attained by Presidential Proclamation 4074. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

The words "instructions, licenses, or otherwise" contained in section 5(b)(1) define the nature and mode of the regulatory authority intended to be delegated to the President. These words conform to the phraseology used throughout the history of the Act in the establishment of a system of licenses and permits for the control of property during a time of war and crisis and which have come to be recognized as the hallmark and distinguishing feature of the Act. These words likewise serve to evidence a recognition on the part of the Congress that such delineating and restrictive phraseology, in fact, was employed in order to preclude the all-encompassing construction now urged by the defendant. If the words "regulate • • • importation" were given the construction contended by the defendant, the President by the declaration of a national emergency could determine and fix rates of duty at will, without regard to statutory rates prescribed by the Congress and without the benefit of standards or guidelines which must accompany any valid delegation of a constitutional power by the Congress. *Hampton & Co.* v.

United States, supra, p. 409. The delegation of such an unrestrained and unbridled authority to lay duties, indeed, might well be deemed an abdication by the Congress of its constitutional power to regulate foreign commerce.

In the case of *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935), the Supreme Court, speaking through Mr. Chief Justice Hughes reaffirmed the principle that the Congress cannot abdicate its legislative powers, vested by the Constitution. In holding that section 9(c) of title I of the National Industrial Recovery Act of June 16, 1933 (15 U.S.C., title I, § 709(c)), which authorized the President to prohibit the transportation of petroleum in interstate commerce, constituted an unconstitutional delegation of legislative power, the Court stated:

> [I]t gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. • • • [*Id.*, p. 415.]

Again, in referring to article I, section 1 of the Constitution, providing that all legislative powers therein granted shall be vested in the Congress, and to article I, section 8, paragraph 18, providing that the Congress is empowered to make all laws necessary and proper for the execution of its invested powers, the Court, in the *Panama Refining Co.* case, further stated (*supra,* p. 421):

> • • • The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate

> rules within prescribed limits and the determination of the facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

The Court added (*Id.*, p. 430):

> If § 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function, the Congress could at will and as to such subjects as it chose transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.

It is both the function and duty of the courts to hold the exercise of delegated congressional powers within the confines prescribed by the Congress. It is likewise well settled that a statute subject to two interpretations, should be construed so as to preserve its constitutionality. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

Accordingly, we take the position that section 5(b)(1) of the Trading with the Enemy Act conveys to the Presi-

dent an authority consisting only of a specific mode of regulation, as distinguished from the full and all-inclusive power to regulate foreign commerce. The delegation of the specific regulatory authority, "by means of instructions, licenses, or otherwise," manifestly is restrictive in scope and is but one branch of many attached to the trunk of the tree in which is lodged the all-inclusive substantive power to regulate foreign commerce, vested solely in the Congress.

We, therefore, conclude that section 5(b)(1) of the Act contains such restrictive standards and guidelines as to meet the test of constitutionality, but which, in turn, precludes the President from laying the supplemental duties provided by Presidential Proclamation 4074.

In support of its position, the defendant has placed reliance on the case of *South Puerto Rico Sugar Co. Trading Corp.* v. *United States*, 167 Ct. Cl. 236, 334 F.2d 622 (1964), *cert. denied*, 379 U.S. 964 (1965). The question therein determined by the Court of Claims involved the validity of an "entry fee" charged to the plaintiff as a precondition to the importation of sugar into the United States from the Dominican Republic. The "entry fee" was imposed by the President through the Secretary of Agriculture pursuant to the specific authority provided by the Act of Congress of July 6, 1960, 74 Stat. 330. By the provisions of that Act, the President was authorized to reduce the quota of sugar imported from Cuba and, after so doing, permit the deficit caused by such a quota reduction to be imported and marketed in the United States, "• • • at such times and from such sources, • • • subject to such terms and conditions as he deems appropriate under the prevailing circumstances • • •."

In the detailed discussion of the foreign affairs existing at the time of the enactment of the congressional Act and the imposition of the "entry fee," the court in its majority opinion stressed with particularity the politically sensitive hemispheric conditions and events—the Castro Government in Cuba; the attempt on the life of the President of

Venezuela concerning which the Trujillo Government in the Dominican Republic was alleged to be connected; the collective action taken by the Organization of American States (OAS) against the Dominican Republic in severing diplomatic relations and in the partial interruption of economic relations; the increase in the quantity of Dominican Republic sugar which automatically would be allowed to be exported to the United States by virtue of the reduction of the Cuban quota, a large percentage of which was owned by and operated for the benefit of General Trujillo and his family.

Recognizing the foregoing as matters having great import on the political as well as the economic stability of many nations in the Western Hemisphere, the court gave great weight to the resulting responsibility falling upon the President in the administration of foreign affairs. Relating his singular discretion and authority in this area to the language contained in the Sugar Act, as amended on July 6, 1960, the court stated (334 F.2d, p. 632):

> Exercising his discretion in the light of the needs of United States foreign policy, the President (through his delegates) could lawfully deem it an "appropriate condition" of importation, "under the prevailing circumstances," to require a fee on "replacement" sugar from the Dominican Republic which would deprive the Trujillo regime of the special premium of the United States price (over the world price). • • •

It would appear clear that the majority opinion of the court in essence construed the "entry fee" not as a duty, but as a license exacted by the President, as a "condition," in the course of implementing this country's foreign policy and, thus, within the purpose and purview of the authority granted to the President by the specific statutory language of the Sugar Act, as amended.

The entry fee under consideration in the *South Puerto Rico Sugar* case was imposed as a sanction against the

Dominican Republic. It was not imposed as a duty. We fail to find wherein a proper analogy can be drawn between the executive regulation imposing the "entry fee" directed against the Dominican Republic under the authority of the Sugar Act of 1960, and Presidential Proclamation 4074 imposing the 10 percent surcharge in the form of a "supplemental duty" uniformally on most articles imported into the United States.

The case of *Hamilton* v. *Dillin*, 88 U.S. (21 Wall.) 73 (1875) serves to well illustrate the distinction between the delegation to the Executive by the Congress of an authority to "regulate" pursuant to its constitutional powers to lay and collect taxes and duties and to regulate foreign commerce, as distinguished from authority to regulate pursuant to the war power of government.

The question therein presented related to an Act of Congress enacted during the Civil War authorizing the President to prohibit all commercial intercourse between the Confederacy and the Union and "in his discretion, license and permit commercial intercourse" with any part of such States pursuant to rules and regulations prescribed by the Secretary of the Treasury.[14] The Court in upholding a charge of a license fee of four cents per pound imposed by the Secretary of the Treasury on the importation of cotton from States in insurrection stated (pp. 93-94):

> • • • When, in March, 1863, the President issued his license to trade in cotton and other articles in the insurrectionary districts, under and subject to the conditions contained in the regulations adopted by the Secretary of the Treasury, his action was not inconsistent with or repugnant to the internal revenue law passed the year before. It had nothing to do with that law or the subject-matter of it. The conditions exacted by him were not imposed in the exercise of the taxing power, but of the war power of the government. The exaction itself was not properly a tax, but a bonus required as a condition precedent for engaging in the trade. • • •

[14] 12 Stat. 255, 257 is quoted in part in footnote 7, *supra*.

From the foregoing decision, it will be noted that the license fee in question was neither deemed a tax nor was its application deemed to have resulted from a delegation of the constitutional power of the Congress to regulate foreign commerce. As the Court stated, it was a "bonus required as a condition precedent for engaging in the trade." The specific delegation of authority and the resulting imposition of the license fee was in the exercise of the war power of government.

This court is not without appreciation of the burdensome problems encountered by the Executive as he represents these United States in the society of nations. Nor can the court fail to recognize the efforts of the President to achieve stability in the international trade position and monetary reserves of this country. But neither need nor national emergency will justify the exercise of a power by the Executive not inherent in his office nor delegated by the Congress. Expedience cannot justify the means by which a deserving and beneficial national result is accomplished. To indulge in judicial rationalization in order to sanction the exercise of a power where no power in fact exists is to strike the deadliest of blows to our Constitution.

The power to levy and collect taxes, duties, imposts and excises and to regulate foreign commerce has been vested solely in the Congress by the Constitution.

"The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives but of constitutional authority, for which the best of motives is not a substitute." *Panama Refining Co.* v. *Ryan, supra*, p. 420.

Notwithstanding the broad and expansive authority delegated by various congressional enactments to the Executive in the administration of our international trade relations and affairs, we are of the opinion that Presidential Proclamation 4074 in its attempt to unilaterally assess a surcharge in the form of a supplemental duty in the amount of 10 percent on imports entering this country, exceeded the authority delegated to the President and is, therefore, invalid.

The motion of the plaintiff for summary judgment is granted and the cross-motion of the defendant is denied.

Let judgment be entered accordingly.

MALETZ, Judge, concurring.

I am in accord with the well-reasoned opinion of Chief Judge Boe. Withal, I believe it may be helpful to add some further comments with respect to the defendant's contention that when a national emergency is declared by the President—as was done in Proclamation 4074—he has unlimited discretion to impose supplemental duties on imports by virtue of the authority delegated to him by section 5(b) of the Trading with the Enemy Act, as amended (50 U.S.C. App. (5)). To the extent pertinent, that section provides:

> (b)(1) During the time of war or *during any other period of national emergency declared by the President, the President may*, through any agency that he may designte, or otherwise, and under such rules and regulations as he may prescribe, *by means of instructions, licenses, or otherwise*—
>
> (A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

> (B) investigate, *regulate*, direct and compel, nullify, void, *prevent or prohibit*, any acquisition holding, withholding, use, transfer, withdrawal, transportation, *importation* or exportation *of*, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, *any property in which any foreign country or a national thereof has any interest*,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States; • • •; and *the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.* [Emphasis added.]

• • • • • • •

At the outset, it is fundamental that the court's primary task, in determining whether section 5(b) authorizes the President to impose supplemental duties on imports, is to ascertain the Congressional intent and to construe the section in such a way as to give effect to that intent. This, in turn, requires the provision in issue to be reviewed, not as an isolated, discrete enactment, but in the context of the entire statute of which it is a part. *United States* v. *California Portland Cement Company*, 413 F.2d 161, 166 (9th Cir. 1969); *Stanford* v. *Commissioner of Internal Revenue*, 297 F.2d 298, 308 (9th Cir. 1961); *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 213 F.2d 284, 290 (7th Cir. 1954).

The Trading with the Enemy Act of 1917 (40 Stat. 411 et seq.) came into being as a consequence of the common law doctrine of both England and the United States that during a state of war all commercial intercourse between citizens of belligerent states or countries is prohibited unless specifically authorized by the sovereign.[1] Its declared

[1] See e.g., *The Julia*, 12 U.S. (8 Cranch) 181, 193 (1814); *The Rapid*, 12 U.S. (8 Cranch) 154, 161 (1814); *Hanger* v. *Abbott*, 73 U.S. (6 Wall.) 532, 535 (1868); *Coppell* v. *Hall*, 74 U.S. (7 Wall.) 542, 554 (1869); *United States* v. *Lane*, 75 U.S. (8 Wall.) 185, 195 (1869); *Insurance Co.* v. *Davis*, 95 U.S. 425, 429 (1877).

purpose was "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on."[2] This was accomplished by prohibiting and making unlawful all forms of trading with the enemy "except with the license of the President." 40 Stat. 412, sec. 3(a).

The concept of legalizing trade with the enemy pursuant to license was carried over from the Civil War when legislation was enacted providing for a system of licenses and permits for trading with the inhabitants of the insurrectionary States. Thus, section 5 of the Act of July 13, 1861 (12 Stat. 255, 257) authorized the President to declare the inhabitants of a State or part of a State to be in a state of insurrection; and provided that "thereupon all commercial intercourse" by and between the citizens of those areas and the rest of the United States "shall cease and be unlawful so long as such condition of hostility shall continue," and that all articles coming from or proceeding to such areas shall be forfeited to the United States, together with the vehicle or vessel conveying them, provided, however—

> [t]hat the President may, in his discretion, license and permit commercial intercourse with any such part of said State or section, the inhabitants of which are so declared in a state of insurrection, in such articles, and for such time, and by such persons, as he, in his discretion, may think most conducive to the public interest; and such intercourse, so far as by him licensed, shall be conducted and carrier on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury. * * *

Pursuant to this Act, President Lincoln licensed and permitted trading between the citizens of the Union and

[2] S. Rep. No. 111, 65th Cong., 1st Sess. (1917), p. 1. See also *Ex Parte Kumezo Kawato*, 317 U.S. 69, 76 (1942).

the inhabitants of the insurrectionary States which was carried on under rules and regulations issued by the Secretary of the Treasury.[3] What is particularly significant is that the licensing authority delegated to the President and Secretary of the Treasury under the 1861 Act and as carried out in the executive orders, proclamations and regulations issued pursuant thereto, was never construed or even considered as including the power to impose taxes or duties.[4]

[3] On August 16, 1861, the President issued a Proclamation (12 Stat. 1262) declaring that the inhabitants of certain States, with some exceptions, were in a state of insurrection; that all commercial intercourse with them was unlawful; and that all goods coming in from those States "without the special license and permission of the President, through the Secretary of the Treasury" would be forfeited to the United States. On February 28, 1862, the President issued an executive order licensing and permitting such commercial intercourse between the inhabitants of the areas declared to be in insurrection and the citizens of the States of the Union "within the rules and regulations which have been or may be prescribed by the Secretary of the Treasury for the conducting and carrying on of the same on the inland waters and ways of the United States." See *Hamilton* v. *Dillin*, 88 U.S. (21 Wall.) 73, 76 (1875). This was subsequently revised by the "License of Trade" issued by the President on March 31, 1863, permitting commercial intercourse with inhabitants of the insurrectionary States pursuant to regulations adopted on that same date by the Secretary of the Treasury and subsequently modified on September 11, 1863. *Id.* at 77, 78. The following year, the licensing of commercial intercourse by private citizens with inhabitants of the insurrectionary areas was vastly circumscribed and restricted by sections 4, 8 and 9 of the Act of July 2, 1864 (13 Stat. 376 and 377). See *United States* v. *Lane*, 75 U.S. (8 Wall.) 185, 186-187 (1869).

[4] In fact, the contrary position was taken by the Supreme Court in *Hamilton* v. *Dillin, supra*, 88 U.S. 73. There the appellant contended that a license fee required by Treasury Department regulations to be paid as a condition for obtaining a permit to purchase cotton in insurrectionary areas was illegally exacted on the ground that it was essentially a tax and, therefore, an improper exercise of Congress' power under the Constitution "to lay and collect taxes, duties, imposts and excises." *Id.* at 81. The Court, however, rejected this argument, holding that the license fee was

(footnote continued on following page)

In sum, as explained by Charles Warren, Assistant Attorney General and author of the measure, the Trading with the Enemy Act of 1917—like the Act of July 13, 1861—"recognizes that there may be some kinds of business transactions or commercial intercourse between citizens of this country and enemies which may be carried on or performed with safety to the United States, and it provides for those transactions by means of a system of license."[5] Mr. Warren also observed that "[t]he pro-

(footnote continued from preceding page)

not a tax imposed under the taxing power, but a "bonus" imposed under the war power of the government; that the power of the government to open and regulate trade with the enemy was intended to be conferred upon the President and the Secretary of the Treasury in the Act of July 13, 1861; and that this included the power to impose such conditions as they saw fit, including payment of a license fee. The Court held (*Id.* at 94 and 97):

> • • • The conditions exacted by him [the President] were not imposed in the exercise of the taxing power, but of the war power of the government. The exaction itself was not properly a tax, but a bonus required as a condition precedent for engaging in the trade. • • •
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> It is hardly necessary, under the view we have taken of the character of the regulations in question, and of the charge or bonus objected to by the plaintiffs, to discuss the question of the constitutionality of the act of July 13th, 1861, regarded as authorizing such regulations. As before stated, the power of the government to impose such conditions upon commercial intercourse with an enemy in time of war as it sees fit, is undoubted. It is a power which every other government in the world claims and exercises, and which belongs to the government of the United States as incident to the power to declare war and to carry it on to a successful termination. We regard the regulations in question as nothing more than the exercise of this power. It does not *belong to the same category as the power to levy and collect taxes, duties, and excises.* It belongs to the war powers of the government, just as much so as the power to levy military contributions, or to perform any other belligerent act. [Emphasis added.]

[5] Testimony of Mr. Warren at Hearings on H.R. 4704 (the Trading with the Enemy bill) Before the House Comm. on Interstate and Foreign Commerce, 65th Cong., 1st Sess. (1917), p. 32.

visions of • • • [the] bill greatly amplify and make more practical a system of license or permit which was provided for by the Government during the Civil War."[6] Thus, section 4 of the Act (40 Stat. 413-414) contained elaborate provisions for control over branches or agencies of enemy corporations and enemy ally corporations doing business in this country, including insurance and reinsurance companies, under a procedure by which they could apply to the President for a "license to continue to do business."

Section 5(a) (40 Stat. 415) gave the President the power to issue (and suspend or revoke) licenses to do business with the enemy or its allies and to perform any act otherwise made unlawful by the Act without such license. Further, section 5(b) (*ibid.*) authorized the President "by means of licenses or otherwise" to investigate, regulate or prohibit any transactions in foreign exchange, export, or earmarkings of coin, bullion, or currency, and evidence of transfers of indebtedness or ownership of property between the United States and any foreign country, whether

[6] Testimony of Mr. Warren at Hearings on H.R. 4960 (the Trading with the Enemy bill that was subsequently enacted) Before a Subcomm. of the Senate Comm. on Commerce, 65th Cong., 1st Sess. (1917), p. 131. See also testimony of the General Counsel of the Federal Reserve Board, *id.* at pp. 196-216; 55 Cong. Rec. 4852-4857 and 4862-4863 (1917). The Senate Commerce Committee in reporting out H.R. 4960 noted that the bill was susceptible of division into four portions. Thus, the Committee stated (S. Rep. No. 111, 65th Cong., 1st Sess. (1917), p. 3):

> The first portion defines the word "enemy" and prescribes the acts which shall be forbidden and which are made criminal if performed without license.
>
> The second portion provides for a system by which any act otherwise unlawful and criminal may be licensed • • • if compatible with the safety of the United States and the successful prosecution of the war.
>
> The third portion deals with the conservation and utilization of enemy property during the war.
>
> The fourth portion deals with the entirely separable question of patents.

enemy or neutral, or between residents of one or more foreign countries and any person in the United States.

More particularly, section 5 provided as follows (40 Stat. 415):

> (a) That the President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof, and to perform any act made unlawful without such license in section three hereof, and to file and prosecute applications under subsection (b) of section ten hereof; and he may revoke or renew such licenses from to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act; and the President may exercise any power or authority conferred by this Act through such officer or officers as he shall direct.
>
> If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him.
>
> (b) That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency, transfers of credit in any form (other than credits relating solely to transactions to be executed wholly within the United States), and transfers of evidences of indebtedness or of the ownership of property between the United States and any foreign country, whether enemy, ally of enemy or otherwise, or between residents of one or more foreign countries, by any person within the United States; and he may require any such person engaged in any such transaction to furnish, under oath, complete information relative thereto, including the production of any books of account, contracts, letters or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed.

Against this background of which Congress was well aware, as evidenced from the Congressional committee hearings, reports and debates in both Houses on the bill,[7] it is clear that section 5 of the Trading with the Enemy Act of 1917 was a revitalization, albeit in more elaborate form, of the licensing provisions of section 5 of the Act of July 13, 1861; that it conferred upon the President the same kind of regulatory licensing authority that was granted the President and Secretary of the Treasury in the 1861 Act; and that this authority was to be exercised not only over trade with the enemy (section 5(a)), but over credit transfers, foreign exchange transactions, exports of precious metals and transfers of evidences of indebtedness or ownership of property between the United States and any foreign country (section 5(b)). It is equally clear that this licensing authority was not intended to be a grant of Congress' power to impose taxes or levy duties on imports. *Hamilton* v. *Dillin, supra*, 88 U.S. 73.

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[7] The Congressional hearings, reports and debates thus referred to are cited in footnotes 8, 9, and 10, respectively, of Chief Judge Boe's opinion.

Indeed, grave concern was expressed by the Secretary of the Treasury over the fact that the Trading with the Enemy bill as approved by the House (H.R. 4960) did not provide for adequate Presidential control over imports, an omission he considered to be serious. Thus the Secretary explained:[8]

> * * * It may be necessary to regulate the importation of non-essentials of commerce in order to prevent any adverse and objectionable balance of trade involving settlement in gold. Through governmental control of imports it will also be possible to insure the most efficient employment of certain imported raw materials essential to the effective prosecution of the war. It is probable that in the adjustment of trade relations, now so profoundly affected by war conditions, better results could be obtained than are now possible if the Government had control of these matters when dealing with governments that have imposed restrictions upon the exports of raw materials needed by our war industries.

The Senate, upon being apprised of the Secretary's views, approved a recommendation to add to H.R. 4960 a new section 11. This new section, which was subsequently agreed to by the House, provided (40 Stat. 422-423):

> Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation any article or articles mentioned in such proclamation except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by

[8] Letter from Treasury Secretary William G. McAdoo to Senator Ransdell, dated Sept. 11, 1917, 55 Cong., Rec. 7013 (1917).

> Congress: *Provided, however,* That no preference shall be given to the ports of one State over those of another.

It is important to note that this broad power over imports conferred upon the President—who could allow their entry into this country "under such regulations or orders, and subject to such limitations and exceptions" as he might prescribe—was not a part of the licensing provisions of the 1917 Trading with the Enemy Act; rather, it was included as a temporary wartime measure which, by its very language remained in effect only "during the present war"[9] and terminated at the close of that conflict.[10] Moreover, it is significant that section 11, which delegated to the President such broad authority over imports, was never reenacted or even proposed for passage in the course of subsequent amendments to the Trading with the Enemy Act.

Section 5 on the other hand was constructed in terms of permanent legislation; accordingly, subsection (a) thereof automatically went into effect again at the outbreak of World War II. See *Markham* v. *Cabell,* 326 U.S. 404 (1945). Subsection (b), however, by virtue of subsequent amendment, became no longer limited in its application solely to periods of conflict. In this connection, on March 9, 1933, in order to deal with the domestic banking emergency, the President's authority to act under section 5(b)

[9] Sections 3(d), 4(b), 13 and 14 of the Trading with the Enemy Act of 1917, which also referred to the "present war," similarly terminated at the conclusion of World War I.

[10] There was one exception to the termination of section 11, which exception was effected by the enactment on November 19, 1919 of H.J. Res. 269 (41 Stat. 361). That statute provided that "notwithstanding the prior termination of the present war," the provisions of the Trading with the Enemy Act and of any Presidential Proclamation issued pursuant thereto which prohibited or controlled the importation of dyes and other products derived from coal tar were to be continued to January 15, 1920.

was extended to any "period of national emergency declared" by him, and he was given the power to regulate "by means of licenses or otherwise • • • transfers of credit between or payments by banking institutions." 48 Stat. 1.[11]

On May 7, 1940, Congress by Joint Resolution (54 Stat. 175) (1) authorized the President, under section 5(b), "by means of licenses or otherwise," to regulate transactions in stocks and securities in which any foreign country or national had an interest; and (2) confirmed an Executive Order of April 10, 1940 and regulations issued thereunder restricting all transactions and transfers of credit in which Norway and Denmark (which had been invaded by Germany) or their nationals had an interest.[12]

Section 5(b) was last amended on December 18, 1941, by section 301 of the First War Powers Act of 1941 (55 Stat. 839) in order to give the President more comprehensive control over the seizure, vesting and disposition of all property of any foreign country or national.[13] To accom-

[11] Prior thereto, on September 24, 1918, the President was authorized under section 5(b) to regulate or prohibit "by means of licenses or otherwise" the hoarding or melting of gold or silver coin, bullion or currency, and to regulate (until two years after "the termination of the present war") any transactions in bonds and certificates of indebtedness of the United States, 40 Stat. 966.

[12] See H. Rep. No. 2009, 76th Cong., 3d Sess. (1940), pp. 1-2. In 1941, the House Judiciary Committee pointed out that under the system of property control authorized by the 1940 amendment, "the Government exercises supervision over transactions in foreign property either by prohibiting such transactions *or by permitting them on condition and under license.*" [Emphasis added.] H. Rep. No. 1507, 77th Cong., 1st Sess. (1941), pp. 2-3.

[13] See H. Rep. No. 1507, *supra*, note 12. See also S. Rep. No. 911, 77th Cong., 1st Sess. (1941), p. 2. With these added powers, the President could "reach enemy interests which masqueraded under • • • innocent fronts." *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 485 (1947). On the effect of the 1941 amendment with respect to licensing foreign trade and credit transfers, see Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law & Contemp. Prob. 17, 32 et seq. (1945-46).

plish this purpose, the President was authorized, among other things, to regulate "by means of *instructions*, licenses, or otherwise • • • any acquisition holding, withholding, use, transfer, withdrawal, transportation, *importation* or exportation • • • involving any property in which any foreign country or a national thereof has any interest • • •."[14] As summed up by Representative Kefauver on the House floor (87 Cong. Rec. 9865 (1941)):

> It was explained to us by representatives of the Treasury that it was absolutely necessary for the present act—5(b)—to be reenacted in order to enable the Treasury to carry out its policy of freezing certain credits and of handling certain financial interests during the war. The explanation made to us, and I think it is carried out in this bill, is that the only change the Treasury wanted in 5(b) of the Trading With the Enemy Act was to give the executive department power not only to passively freeze credits and to negatively handle the operation of some manufacturing plants by a system of licenses or controls that they have to work under at the present time, but also to give the President the power to actively put into operation those interests or those securities or plants that might be taken over and be seized under authority of 5(b) of the present act.

Thus it can be seen that the amendments to section 5(b) successively extended the President's licensing authority in the areas of foreign exchange, banking and currency transactions and transactions involving property in which

[14] The words "instructions" and "importation" were added to section 5(b) by the foregoing 1941 amendment. However, there is no indication in the legislative history of this amendment as to the reason for the inclusion of these specific words.

foreign countries or nationals have an interest.[15] However, nowhere in the Congressional debates, committee hearings or reports on section 5(b) and the amendments thereto is

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[15] For an example of regulations which license or authorize transactions subject to executive control under section 5(b) upon declaration of a national emergency, see the Foreign Assets Control Regulations, as amended, 31 CFR Part 500 (1973). These regulations were first published by the Secretary of the Treasury (to whom the President had delegated the powers conferred upon him by section 5(b), 7 F.R. 1409, February 12, 1942) on December 19, 1950 (15 F.R. 9040) under the national emergency proclaimed by President Truman on December 16, 1950, 64 Stat. A454, which has never been revoked.

Section 500.201 of these regulations as amended, provides in pertinent part:

> (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:
>
> (1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;
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> (2) All transactions in foreign exchange by any person within the United States; and
>
> (3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property by any person within the United States.
>
> (b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentally designated by

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there even a glimmer of a suggestion that Congress ever intended—or even considered—this section as a vehicle for delegating any of its tariff-making authority.

Furthermore, a finding that the President has the power under section 5(b) to impose whatever tariff rates he deems desirable simply by declaring a national emergency would not only render our trade agreements program nugatory, it would subvert the manifest Congressional intent to maintain control over its Constitutional powers to levy tariffs. The fact is that Congress has never lightly delegated its authority in this area and any delegation of such power has been—with the exception of section 11, the temporary wartime provision of the Trading with the Enemy Act—specific and restricted in its operation.

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> him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:
>
> (1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and
>
> (2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.
>
> (c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.
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> • • • • • •

Another example of the exercise under section 5(b) of Presidential authority to regulate international financial transactions is the Foreign Direct Investment Program established pursuant to Executive Order 11387 which was issued on January 1, 1968 (33 F.R. 47) on the basis of the continuing national emergency declared by President Truman in 1950. This program restricts transfers of capital to foreign countries by investors in the United States and requires repatriation to this country by such investors of portions of their foreign earnings and short-term financial assets held abroad.

Thus, our foreign trade agreement program, commencing with the Reciprocal Trade Agreements Act of 1934 (48 Stat. 943), the subsequent amendments thereto, and culminating in the Trade Expansion Act of 1962 (76 Stat. 872), has gradually expanded the authority of the President, in negotiating trade agreements, to modify, increase or reduce duties; however, this authority has always been subject to various restrictions and limitations.[16]

In fact, the legislative history of the trade agreement statutes is enlightening in connection with defendant's claim of authority under the Trading with the Enemy Act. For during the entire course of the Congressional committee hearings,[17] reports,[18] and debates on the trade agreement statutes, it was never once suggested that the President already possessed emergency rate-making authority, either under the Trading with the Enemy Act or any other statute. Rather, it was frequently emphasized that the President was being given new power to impose tariffs.[19]

Furthermore, as Chief Judge Boe observed in his analysis of the Trade Expansion Act of 1962, Congress' refusal to accede to the Senate's proposal to insert a new provision (section 353) giving the President carte blanche authority to increase existing duties or impose new ones whenever he deemed it in the national interest, is a reflection of its firm stand against such unfettered and unrestricted delegation of its tariff-making authority to the President.

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[16] For example, even section 252(a)(3) of the Trade Expansion Act of 1962 (19 U.S.C. 1882(a)(3)), which gives the President substantial tariff-making authority is operative only under clearly defined conditions. It authorizes the President to impose duties or other import restrictions "to the extent he deems necessary and appropriate" on the products of any foreign country or instrumentality, but only in the event that such foreign country or instrumentality establishes or maintains unjustifiable foreign import restrictions against United States agricultural products which impair the value of tariff commitments made to the United States, oppress United States commerce, or prevent the expansion of trade on a mutually advantageous basis. Furthermore, he must first provide an opportunity for the presentation of views concerning such foreign import restrictions which are maintained against United States commerce and, upon request by any interested person, provide for appropriate public hearings. 19 U.S.C. 1882(d).

[17] See Hearings on H.R. 8430 Before the House Comm. on Ways and Means, 73d Cong., 2d Sess. (1934); Hearings on H.R. 8687 Before the Senate Comm. on Finance, 73d Cong., 2d Sess. (1934); Hearings on H.R. 9900 Before the House Comm. on Ways and Means, 87th Cong., 2d Sess. (1962); Hearings on H.R. 11970 Before the Senate Comm. on Finance, 87th Cong., 2d Sess. (1962).

[18] See H. Rep. No. 1000, 73d Cong., 2d Sess. (1934); S. Rep. No. 871, 73d Cong., 2d Sess. (1934); H. Rep. No. 1818, 87th Cong., 2d Sess. (1962); S. Rep. No. 2059, 87th Cong., 2d Sess. (1962); Conf. Rep. No. 2518, 87th Cong., 2d Sess. (1962).

[19] See, for example, the following Congressional comments on H.R. 11970, which was subsequently enacted as the Trade Expansion Act of 1962:

> *Rep. Brown.* • • • I do not care which President may be in office, because I have opposed some of those things under a Republican administration just as I am against this proposal now to give the President of the United States unlimited powers in the field of trade tariffs, and import duties such as have never been exercised by any President in the past, have never been granted to any President. • • • 108 Cong. Rec. 11912 (1962).
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> *Sen. Curtis.* • • • The pending bill represents the greatest delegation of power that has ever been given to any President. Heretofore our trade agreements have prevented a negotiation of 50 percent of the tariffs. This bill authorizes the President to wipe out the tariffs. It also authorizes him to impose tariffs even on goods that are not dutiable at the present time. *Id.* at 19756.
>
> • • • • • •
>
> *Sen. Humphrey.* With regard to the first—the *new* authority which this act would delegate to the President: There are those who charge that the Trade Expansion Act would result in full and complete abandonment of the constitutional authority of Congress to regulate tariffs. This act would do nothing of the kind. What it does is to continue for a limited fixed period the delegation of authority to set tariff rates within limits defined by Congress and with well-established safeguards that has [sic] been in effect since 1934. • • • [Emphasis added.] *Id.* at 19867.

For all the foregoing reasons, it must be concluded that the regulatory licensing power delegated to the President by section 5(b) of the Trading with the Enemy Act does not include the authority to assess the 10 percent import surcharge here in question.

Re, Judge, concurring.

The pertinent legislative delegations of power do not authorize the President to assess the "surcharge in the form of a supplemental duty" prescribed in Presidential Proclamation 4074. Since the imposition of the surcharge is therefore *ultra vires,* I concur in the result which grants plaintiff's motion for summary judgment.

CONSTITUTION OF THE UNITED STATES

ARTICLE I

Section 8, Clause 1

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

TRADING WITH ENEMY ACT

§ 5. Suspension of provisions relating to ally of enemy; regulation of transactions in foreign exchange of gold or silver, property transfers, vested interests, enforcement and penalties

(a) The President, if he shall find it compatible with the safety of the United States and with the successful prosecution of the war, may, by proclamation, suspend the provisions of this Act [sections 1-6, 7-39 and 41-44 of this Appendix] so far as they apply to an ally of enemy, and he may revoke or renew such suspension from time to time; and the President may grant licenses, special or general, temporary or otherwise, and for such period of time and containing such provisions and conditions as he shall prescribe, to any person or class of persons to do business as provided in subsection (a) of section four hereof [section 4(a) of this Appendix], and to perform any act made unlawful without such license in section three hereof [section 3 of this Appendix], and to file and prosecute applications under subsection (b) of section ten hereof [section 10(b) of this Appendix]; and he may revoke or renew such licenses from time to time, if he shall be of opinion that such grant or revocation or renewal shall be compatible with the safety of the United States and with the successful prosecution of the war; and he may

make such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out the provisions of this Act [sections 1-6, 7-39 and 41-44 of this Appendix]; and the President may exercise any power or authority conferred by this Act [said sections] through such officer or officers as he shall direct.

If the President shall have reasonable cause to believe that any act is about to be performed in violation of section three hereof [section 3 of this Appendix] he shall have authority to order the postponement of the performance of such act for a period not exceeding ninety days, pending investigation of the facts by him.

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated

from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

(3) As used in this subdivision the term "United States" means the United States and any place subject to the jurisdiction thereof: *Provided, however,* That the foregoing shall not be construed as a limitation upon the power of the President, which is hereby conferred, to prescribe from time to time, definitions, not inconsistent with the purposes of this subdivision, for any or all of the terms used in this subdivision. Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation.

TARIFF ACT OF 1930, AS AMENDED

SEC. 350

(a) (1) For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will

be promoted by the means hereinafter specified, is authorized from time to time—

(A) To enter into foreign trade agreements with foreign governments or instrumentalities [except the Philippine Islands] thereof: *Provided,* That the enactment of the Trade Agreements Extension Act of 1955 shall not be construed to determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade.

(B) To proclaim such modifications of existing duties[1] and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.

• • •

(3) (A) Subject to the provisions of subparagraphs (B) and (C) of this paragraph and of subparagraph (B) of paragraph (4) of this subsection, the provisions of any proclamation made under paragraph (1) (B) of this subsection, and the provisions of any proclamation of suspension under paragraph (5) of this subsection, shall be in effect from and after such time as is specified in the proclamation.

• • •

[(5) Repealed.]

(6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

TRADE EXPANSION ACT OF 1962

SEC. 102. STATEMENT OF PURPOSES.

The purposes of this Act are, through trade agreements affording mutual trade benefits—

(1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce;

(2) to strengthen economic relations with foreign countries through the development of open and non-discriminatory trading in the free world; and

(3) to prevent Communist economic penetration.

* * *

SEC. 201. BASIC AUTHORITY FOR TRADE AGREEMENTS.

(a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 102 will be promoted thereby, the President may—

(1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and

(2) proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.

* * *

SEC. 255. TERMINATION

(a) Every trade agreement entered into under this title shall be subject to termination or withdrawal, upon due notice, at the end of a period specified in the agreement. Such period shall be not more than 3 years from the date on which the agreement becomes effective. If the agreement is not terminated or withdrawn from at the end of the period so specified, it shall be subject to termination or withdrawal thereafter upon not more than 6 months' notice.

(b) The President may at any time terminate, in whole or in part, any proclamation made under this title.

* * *

SEC. 252. FOREIGN IMPORT RESTRICTIONS—IMPAIRMENT OF VALUE OF TARIFF COMMITMENTS, OPPRESSION OF COMMERCE, OR PREVENTION OF EXPANSION OF TRADE; PRESIDENTIAL ACTION

(a) Whenever unjustifiable foreign import restrictions impair the value of tariff commitments made to the United States, oppress the commerce of the United States, or prevent the expansion of trade on a mutually advantageous basis, the President shall—

(1) take all appropriate and feasible steps within his power to eliminate such restrictions,

(2) refrain from negotiating the reduction or elimination of any United States import restriction under section 1821(a) of this title in order to obtain the reduction or elimination of any such restrictions, and

(3) notwithstanding any provision of any trade agreement under this chapter and to the extent he deems necessary and appropriate, impose duties or other import restrictions on the products of any foreign country or instrumentality establishing or maintaining such foreign import restrictions against United

States agricultural products, when he deems such duties and other import restrictions necessary and appropriate to prevent the establishment or obtain the removal of such foreign import restrictions and to provide access for United States agricultural products to the markets of such country or instrumentality on an equitable basis.

(b) Whenever a foreign country or instrumentality the products of which receive benefits of trade agreement concessions made by the United States—

(1) maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or

(2) engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce,

the President shall, to the extent that such action is consistent with the purposes of section 1801 of this title—

(A) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(B) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

(c) Whenever a foreign country or instrumentality, the products of which receive benefits of trade agreement concessions made by the United States, maintains unreasonable import restrictions which either directly or indirectly substantially burden United States commerce, the President may, to the extent that such action is consistent with the purposes of section 1801 of this title, and having due

regard for the international obligations of the United States—

(1) suspend, withdraw, or prevent the application of benefits to trade agreement concessions to products of such country or instrumentality, or

(2) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

(d) The President shall provide an opportunity for the presentation of views concerning foreign import restrictions which are referred to in subsections (a), (b), and (c) of this section and are maintained against United States commerce. Upon request by any interested person, the President shall, through the organization established pursuant to section 1872(a) of this title, provide for appropriate public hearings with respect to such restrictions after reasonable notice and provide for the issuance of regulations concerning the conduct of such hearings. Pub.L. 87-794, Title II, § 252, Oct. 11, 1962, 76 Stat. 879.

PROCLAMATION 4074

IMPOSITION OF SUPPLEMENTAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

By the President of the United States of America

A Proclamation

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or

charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

C. To implement section B of this Proclamation, the following new subpart shall be inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States:

SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES

Subpart C headnotes:

1. This subpart contains modifications of the provisions of the tariff schedules proclaimed by the President in Proclamation 4074.

2. *Additional duties imposed*—The duties provided for in this subpart are cumulative duties which apply in addition to the duties otherwise imposed on the articles involved. The provisions for these duties are effective with respect to articles entered on and after 12:01 a.m., August 16, 1971, and shall continue in effect until modified or terminated by the President or by the Secretary of the Treasury (hereinafter referred to as the Secretary) in accordance with headnote 4 of this subpart.

3. *Limitation on additional duties*—The additional 10 percent rate of duty specified in rate of duty column numbered 1 of item 948.00 shall in no event exceed that rate which, when added to the column numbered 1 rate imposed on the imported article under the appropriate item in schedules 1 through 7 of these schedules, would result in an aggregated rate in excess of the rate provided for such article in rate of duty column numbered 2.

4. For the purposes of this subpart—

(a) *Delegation of authority to Secretary*—The Secretary may from time to time take action to reduce, eliminate or reimpose the rate of additional duty herein or to establish

exemption therefrom, either generally or with respect to an article which he may specify either generally or as the product of a particular country, if he determines that such action is consistent with safeguarding the balance of payments position of the United States.

(b) *Publication of Secretary's actions*—All actions taken by the Secretary hereunder shall be in the form of modifications of this subpart published in the FEDERAL REGISTER. Any action reimposing the additional duties on an article exempted therefrom by the Secretary shall be effective only with respect to articles entered on and after the date of publication of the action in the FEDERAL REGISTER.

(c) *Authority to prescribe rules and regulations*—The Secretary is authorized to prescribe such rules and regulations as he determines to be necessary or appropriate to carry out the provisions of this subpart.

5. *Articles exempt from the additional duties*—In accordance with determinations made by the Secretary in accordance with headnote 4(a), the following described articles are exempt from the provisions of this subpart:

• • • • • •

THE PRESIDENT

Item	Article	Rates of duty	
		1	2
948.00	Articles, except as exempted under headnote 5 of this subpart, which are not free of duty under these schedules and which are the subject of tariff concessions granted by the United States in trade agreements ..	10% ad val.. (See headnote 3 of this subpart.)	No change.

D. This Proclamation shall be effective 12:01 a.m., August 16, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of August in the year of our Lord nineteen hundred and seventy-one, and of the Independence of the United States of America the one hundred and ninety-sixth.

RICHARD NIXON

PROCLAMATION 4098

TERMINATION OF ADDITIONAL DUTY FOR BALANCE OF PAYMENTS PURPOSES

By the President of the United States of America

A Proclamation

WHEREAS, in order to impose a surcharge required by the balance of payments position of the United States, Proclamation 4074, dated August 15, 1971, terminated in part for such period as necessary prior Presidential Proclamations insofar as such proclamations were inconsistent with, or proclaimed duties different from, those made effective pursuant to the terms of Proclamation 4074;

WHEREAS, a multilateral agreement has been reached among the Group of Ten major industrial nations which permits removal of the surcharge;

WHEREAS, under section 350(a)(6) of the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), and other authority, the President may, at any time, terminate, in whole or in part, for such period as may be necessary, any proclamation, issued pursuant to section 350 of the Tariff Act or Title II of the TEA;

WHEREAS, under section 350(a)(1)(B) of the Tariff Act and section 201(a)(2) of the TEA, the President may proclaim modifications of any existing duty as he determines to be required or appropriate to carry out trade agreements entered into under the authority of those Acts; and

WHEREAS, I hereby determine that modification of existing duties to restore the rates of duty applicable on August 15, 1971, terminated in part for such period as necessary by Proclamation 4074, is required or appropriate to carry out such trade agreements;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby terminate paragraphs B and C of Proclamation 4074.

B. I hereby proclaim such modification of duties as is necessary to restore the rates of duty in effect on August 15, 1971.

C. To implement this Proclamation, the subpart inserted after subpart B of part 2 of the Appendix to the Tariff Schedules of the United States, entitled "SUBPART C—TEMPORARY MODIFICATIONS FOR BALANCE OF PAYMENTS PURPOSES" is deleted therefrom.

D. This Proclamation shall be effective with respect to merchandise entered, or withdrawn from warehouse, for consumption on or after December 20, 1971.

IN WITNESS WHEREOF, I have hereunto set my hand this twentieth day of December in the year of our Lord nineteen hundred and seventy-one, and of the Independence

of the United States of America the one hundred and ninety-sixth.

RICHARD NIXON

THE GENERAL COUNSEL OF THE TREASURY
Washington, D.C. 20220

(SEAL) Sep 29 1971

Opinion of the General Counsel

LEGAL BASIS FOR THE IMPOSITION OF A SURCHARGE

On August 15, 1971, the President issued Proclamation No. 4074 (36 F.R. 15724, August 17, 1971) by which he terminated in part prior proclamations which carried out trade agreements in order to provide, for such period as may be necessary, an additional 10 percent *ad valorem* duty on dutiable imports.

The statutory authority for imposition of the surcharge by terminating prior proclamations is found in section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. 1351; hereinafter the "Tariff Act"), and section 255(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1885; hereinafter the "TEA"). The authority for reinstatement of concession rates is contained in these provisions as well as in section 201(a)(2) of the TEA (19 U.S.C. 1821) and section 350(a)(1)(B) of the Tariff Act (19 U.S.C. 1351).

Termination of Tariff Concession Proclamations

Pursuant to a legislative grant of authority, the President has entered into international trade agreements providing for concession rates of duty on a broad range of products. In order to give domestic effect to these international agreements, Presidential proclamations have established concession rates in the Tariff Schedules of the United States (19 U.S.C. 1202). It is these proclamations

that the President terminated in part in order to impose the surcharge by establishing an additional 10 percent *ad valorem* rate of duty.* The total rate of duty, including the additional rate of duty, is in no case higher than the column 2 statutory rate, and in most cases is an intermediate rate between the column 2 rate and the most recent concession rate.

This action to impose an additional duty was taken by the President under sections 350(a)(6) of the Tariff Act and 255(b) of the TEA. Under these sections, Congress authorized the President to "at any time terminate, in whole or in part, any proclamation" made to carry out trade agreements under these Acts. With respect to some articles, particularly those to which application of the surcharge has resulted in a total rate of duty equal to the full column 2 rate, the President has used his full power to terminate prior proclamations (insofar as the rate is concerned); and with respect to other articles for which intermediate rates were established, he used his authority to terminate in part (insofar as the rate is concerned).

There are no conditions or qualifications placed on the President's termination authority under sections 350(a)(6) or 255(b). There is no evidence in the legislative history either of the Tariff Act or of the TEA that the President's authority to terminate prior proclamations was to be any less broad than its language would suggest. On the contrary, the retention of the same unqualified language for almost forty years although there have been numerous

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* Paragraph B of Proclamation 4074 states in relevant part:

"(1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

"(2) Such proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. . . ."

amendments of the trade agreements authority indicates a Congressional intention to grant to the President broad discretionary power in this area. When originally enacted in 1934 as part of the Reciprocal Trade Agreements Act (48 Stat. 943), the termination authority formed the concluding sentence of subsection (a)(2) of section 350, and provided: "The President may at any time terminate any such proclamation in whole or in part." Although Congress frequently amended other provisions of section 350(a) of the Tariff Act, the termination authority remained unqualified. In 1962, when Congress passed the TEA, it repealed (section 257(b) of the TEA) portions of section 350(a), but retained the termination authority as part of the Tariff Act and added this same unqualified authority to terminate proclamations to the TEA.

In addition, the courts have generally given a broad construction to the President's termination powers and have refused to imply limitations on these powers. *American Bitumuls and Asphalt Co. et al.* v. *United States,* 44 CCPA 199 (1957), *cert. den.* 355 U.S. 883 (1957); *United States* v. *Metropolitan Petroleum Corp.,* 42 CCPA 38 (1954); *Baer* v. *United States,* 8 Cust. Ct. 104 (1942); and *Barclay and Company, Inc.* v. *United States,* 41 Cust. Ct. 135, C.D. 2031 (1958), *affirmed,* 47 CCPA 133, C.A.D. 745 (1960).

Thus, the language of the statute, the legislative history and the broad interpretation given to the termination authority by the courts clearly show that the President had authority under sections 350(a)(6) of the Tariff Act and 255(b) of the TEA to impose the import surcharge.

The Restoration of Previously Proclaimed Tariff Concession Rates

The further question has been raised of whether the power to terminate trade agreement proclamations vested in the President by Congress is confined solely to ending completely the application of a concession rate granted

under an international agreement or whether the President may restore by proclamation the terminated rate at a future time pursuant to the still valid international trade agreement providing for the concession rate.

The President has authority under the words "in part" contained in sections 255(b) of the TEA and 350(a)(6) of the Tariff Act to suspend proclamations implementing trade agreements by terminating them for a period of time.

In addition, there is authority in section 201(a)(2) of the TEA and section 350(a)(1)(B) of the Tariff Act to implement trade agreements by restoring previously terminated concession rates. Section 201 of the TEA which contains the basic authority of the Executive for trade agreements provides in relevant part:

> SEC. 201. BASIC AUTHORITY FOR TRADE AGREEMENTS.
>
> (a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 102 will be promoted thereby, the President may—
>
> (1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
>
> (2) proclaim such modification or continuance of any existing duty . . . as he determines to be required or appropriate to carry out any such trade agreement.

Similar authority for proclaiming modifications of existing duties is contained in section 350(a)(1)(B) of the Tariff Act.

Thus, under both the TEA and the Tariff Act, the President is authorized to proclaim changes in existing duties whenever he determines that such changes are required or appropriate to carry out any trade agreements

entered into under the authority of these Acts. In the present case, modifications of existing duties to remove the surcharge and reinstitute the full concession rates would clearly be appropriate to carry out prior trade agreements entered into under the authority of the TEA and the Tariff Act. The continuing validity of these trade agreements was in no way affected by Proclamation No. 4074 and they remain in full effect.

The time limitation applicable to the authority for entering into new agreements (*i.e.*, after June 30, 1962, and before July 1, 1967) under the TEA is not applicable to proclaiming the internal effectiveness of trade agreements entered into prior to July 1, 1967. The language of section 201 makes clear that the time limitation applies solely to entering into new trade agreements and not to proclaiming the internal effect of trade agreements entered into prior to July 1, 1967. Moreover, the legislative history explicitly supports this interpretation of the statutory language. The technical explanation of the bill in the House Report of the Trade Expansion Act of 1962 specifically provides that there is no time period in which proclamations under section 201(a)(2) must be issued. (H. Rept. No. 1818, 87th Cong., 2d Sess., 34 (1962)). Similarly, time limitation provisions in section 350 of the Tariff Act have no application to the proclamation authority contained in section 350(a)(1)(B).

Conclusion

It is concluded, therefore, that the President has authority under the Tariff Act of 1930, as amended, and the Trade Expansion Act of 1962 to levy the additional duty and at a later date to restore the Tariff concessions that had been terminated.

SAMUEL R. PIERCE, JR.
Samuel R. Pierce, Jr.
General Counsel

Supreme Court, U. S.
FILED
NOV 12 1976
MICHAEL RODAK, JR., CLERK

No. 76-312

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

LEONARD SCHAITMAN,
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Tariff Act of 1930, 48 Stat. 943, as amended, Section 350(a), 19 U.S.C. 1351(a)	2, 4, 5, 16
Trade Expansion Act of 1962, 76 Stat. 872 *et seq.*:	
Section 201, 19 U.S.C. 1821	4
Section 255(b), 19 U.S.C. 1885(b)	2, 4, 5, 16

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Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978 *et seq.*:	
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Section 122(h), 19 U.S.C. (Supp. V) 2132(h)	7-8
Trading with the Enemy Act, 40 Stat. 411, as amended *et seq.*:	
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28 U.S.C. 1582	5
55 Stat. 839	10

Miscellaneous:

Presidential Proclamation 4074, 3 C.F.R. 80 (1971 Comp.)	*passim*
Presidential Proclamation 4098, 3 C.F.R. 116 (1971 Comp.)	4

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-312

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Customs and Patent Appeals (Pet. App. 1a) is reported at 534 F. 2d 920. The judgment order of the Customs Court (Pet. App. 2a-3a) is not officially reported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on June 3, 1976. The petition for a writ of certiorari was filed on August 31, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the President was authorized by statute to impose a limited, temporary surcharge upon imports in time of declared national emergency.

STATUTORY PROVISIONS INVOLVED

Section 350(a) of the Tariff Act of 1930, 48 Stat. 943, as amended, 19 U.S.C. 1351(a), in relevant part provides:

> (a)(1) For the purpose of expanding foreign markets for the products of the United States * * * the President * * * is authorized from time to time—
>
> (A) To enter into foreign trade agreements with foreign governments or instrumentalities thereof * * *.
>
> (B) To proclaim such modifications of existing duties * * * as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.
>
> * * * * *
>
> (6) The President may at any time terminate, in whole or in part, any proclamation made pursuant to this section.

Section 255(b) of the Trade Expansion Act of 1962, 76 Stat. 880, 19 U.S.C. 1885(b), in relevant part provides:

> (b) The President may at any time terminate, in whole or in part, any proclamation made under this title.

Section 5(b) of the Trading with the Enemy Act, 40 Stat. 415, as amended, 50 U.S.C. App. 5(b), in relevant part provides:

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, * * * by means of instructions, licenses, or otherwise—
>
> * * * * *
>
> (B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest * * *.

STATEMENT

In 1971, the United States experienced an economic crisis of both domestic and international dimensions. As part of an attempt to meet this crisis, the President, on August 15, 1971, issued Proclamation 4074, 3 C.F.R. 80 (1971 Comp.) (Pet. App. 101a-105a).

In Proclamation 4074, the President noted that there had been a prolonged decline in the monetary reserves of the United States, that the trade and international competitive position of the United States was threatened, and that the nation's unfavorable balance of payments required the imposition of a surcharge upon imports. Accordingly, the President, relying upon his authority under the Constitution and

various statutes, "including, but not limited to" the Tariff Act of 1930, as amended, 19 U.S.C. 1351(a), and the Trade Expansion Act of 1962, 19 U.S.C. 1885(b), declared a national emergency and proclaimed a surcharge upon all "dutiable" articles imported into the United States that had been the subject of prior tariff concessions.[1] The surcharge was established at the rate of 10% with the proviso that if an additional duty of 10% ad valorem would cause the duty or charge payable on an article to exceed the amount of duty established by statute, the statutory rate would apply (Pet. App. 102a-103a).[2]

The surcharge imposed by Proclamation 4074 was terminated by Proclamation 4098, 3 C.F.R. 116 (1971 Comp.), on December 20, 1971 (Pet. App. 105a-107a).

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[1] Since the surcharge was limited to dutiable articles, no duties were imposed upon goods that were statutorily entitled to free entry (Pet. App. 26a). If an article had not been the subject of a prior trade concession, the statutorily prescribed rate remained unaffected (*ibid.*).

[2] The rates of duty upon imported merchandise are set forth in the Tariff Schedules of the United States. Generally, the rates are set forth in two columns. Column 2 contains the statutory rates of duty. See 19 U.S.C. 1202(9)(d). Column 1 contains the rates of duty proclaimed by the President in order to implement international agreements (see 19 U.S.C. 1202(4)(b)), as authorized by such statutes as the Tariff Act of 1930, 19 U.S.C. 1351(a), or the Trade Expansion Act of 1962, 76 Stat. 872, 19 U.S.C. 1821. Proclamation 4074, by providing that the imposition of the surcharge could not increase the duty payable above that contained in Column 2 (Pet. App. 102a-103a), in effect provided that the imposition of the surcharge could not increase the rate of duty beyond that established by statute.

Petitioner, an importer of aluminum products, filed a protest with the appropriate customs officials when the Proclamation 4074 surcharge was imposed upon certain aluminum ingot it had imported from Canada. Upon denial of this protest, petitioner commenced this civil action in the Customs Court pursuant to 28 U.S.C. 1582.

The United States moved for summary judgment upon the basis of the decision of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560 (Pet. App. 4a-39a). Petitioner stated that it disagreed with the decision in that case but acknowledged that the decision controlled this case; the motion of the United States was granted (Pet. App. 2a-3a).

The Court of Customs and Patent Appeals affirmed the judgment of the Customs Court (Pet. App. 1a). The court held that while the parties and the goods differed from those involved in *United States* v. *Yoshida International, Inc.*, *supra*, the controlling facts and applicable law presented in that case were the same as those presented here and that, therefore, the decision in *Yoshida* controlled the decision in this case.

In *Yoshida*, the court, after rejecting the government's contention that Proclamation 4074 was authorized by the Tariff Act of 1930, 19 U.S.C. 1351(a)(6), and the Trade Expansion Act of 1962, 19 U.S.C. 1885(b), held that Section 5(b) of the Trading with the Enemy Act authorized the President to issue Proclamation 4074. According to the court, Section 5(b) authorized the President in time of declared

national emergency to regulate, "by means of instructions, licenses, or otherwise," the importation of "any" property in which "any" foreign country or foreign national possessed an interest.

The court found no indication in the legislative history that the Congress intended to prohibit the use of surcharges to implement the statute or to limit the application of the statute to property possessing an "enemy-taint." In addition, since, in the court's view, the statute contained an intelligible standard, there was no need to interpret the statute narrowly so as to preclude the use of surcharges in order to avoid the possibility that the statute contained an unconstitutional delegation of authority. Finally, the court reviewed the limited and temporary nature of the surcharge imposed by Proclamation 4074 and held that the surcharge that the President had imposed constituted a reasonable exercise of the authority conferred by Section 5(b).

ARGUMENT

In view of the enactment of the Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, which specifically directs and authorizes the President to impose temporary import surcharges "[w]henever fundamental international payments problems require," the decision below is of no continuing substantial importance. Section 122(a), 19 U.S.C. (Supp. V) 2132(a). Moreover, the Court of Customs and Patent Appeals correctly held that Section 5(b) of the Trading with the Enemy Act authorized the limited and temporary

surcharge imposed by Presidential Proclamation 4074 and was not an unconstitutional delegation of legislative authority. In addition, contrary to the view of the court, the surcharge also was authorized by the Tariff Act of 1930 and the Trade Expansion Act of 1962. Accordingly, review by this Court is not warranted.

1. Presidential Proclamation 4074 imposed a limited surcharge upon certain imports in order to meet a national emergency caused by a decline in the international monetary reserves of the United States and an adverse balance of payments (Pet. App. 101a-102a).

Subsequent to the decision of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560, Congress enacted the Trade Act of 1974. Section 122 of that Act specifically authorizes and directs the President, by proclamation, to impose temporary import surcharges and temporary limitations upon imports through quotas when international monetary difficulties so require. 19 U.S.C. (Supp. V) 2132. Since Congress has now enacted a specific provision authorizing the President to impose an import surcharge of the very type imposed by Proclamation 4074, the decision of the court below that the President was authorized to promulgate Proclamation 4074 by Section 5(b) of the Trading with the Enemy Act has little if any prospective significance.[3]

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[3] Moreover, while Section 122(h) of the Trade Act of 1974 gave the President specific authority to impose import surcharges in situations of international balance-of-pay-

2. Petitioner contends, first, that Section 5(b) of the Trading with the Enemy Act did not authorize the limited and temporary import surcharge imposed by Proclamation 4074 and, second, that if it did, the authorization was an unconstitutional delegation of legislative authority. The Court of Customs and Patent Appeals properly rejected both contentions.

Section 5(b) provides in pertinent part that "during any * * * period of national emergency declared by the President, the President may * * * by means of instructions, licenses, or otherwise * * * regulate * * * [the] importation * * * of * * * any property in which any foreign country or a national thereof has any interest." By its clear terms, the statute authorized the President to issue a proclamation, such as Proclamation 4074, declaring a national emergency and imposing a surcharge "to regulate the importation" of property in which any foreign country or foreign national possessed any interest.

There is no merit to petitioner's contention that the authority to regulate imports "by means of instructions, licenses, or otherwise" does not include the authority to regulate imports by means of import surcharges. This Court recently rejected a similar contention in *Federal Energy Administration* v. *Algonquin SNG, Inc.*, No. 75-382, decided June 17, 1976.

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ments problems, Congress at the same time withdrew the President's authority to impose import surcharges under any other provision of law authorizing the termination of tariff concessions. 19 U.S.C. (Supp. V) 2132(h). Therefore, any issue with respect to the President's authority to issue Proclamation 4074 under the Tariff Act of 1930 and the Trade Expansion Act of 1962 also is of no continuing importance.

There it was contended that the President's authority under Section 127(d), 19 U.S.C. (Supp. V) 1862(b) to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article * * * so that such imports will not threaten to impair the national security * * *" did not include the authority to impose a system of monetary exactions in the form of license fees. In rejecting that contention, the Court stated (slip op. 12):

> [T]he language of [the statute] seems clearly to grant [the President] a measure of discretion in determining the method to be used to adjust imports. We find no support in the language of the statute for respondents' contention that the authorization to the President to "adjust" imports should be read to encompass only quantitative methods—*i.e.*, quotas—as opposed to monetary methods—*i.e.*, license fees—of effecting such adjustments.

Section 5(b) of the Trading with the Enemy Act affords the President similar discretion in selecting methods of regulating imports in times of national emergency. Indeed, Congress in that statute expressly declined to limit the methods available to the President when it provided that he could exercise his powers "by means of instructions, licenses, *or otherwise*" (emphasis supplied).[4]

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[4] The "license fee" system upheld in *Federal Energy Administration* v. *Algonquin SNG, Inc., supra*, is functionally equivalent to the import surcharges imposed by Proclamation 4074, and, as the Court of Customs and Patent Appeals noted (Pet. App. 23a, n. 23), was described by the United States Tariff

Nor is there any support in the legislative history of Section 5(b) for the proposition that in providing that the President could regulate imports by means of "instructions, licenses, or otherwise," Congress intended to preclude the use of an import surcharge.[5] As the Court of Customs and Patent Appeals correctly held in *Yoshida*, there is no indication in the legislative history that Congress intended the Act to be construed other than according to its terms.

Petitioner's further contention that the President's authority under Section 5(b) is limited to "enemy-

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Commission as a "duty system." Since Section 5(b) expressly refers to "licenses" as one of the means by which the President may regulate imports, petitioner's construction of that provision reduces to a contention that Proclamation 4074 is *ultra vires* because the President failed to use the appropriate label (see Pet. App. 23a, n. 23).

[5] The legislative history cited by petitioner (Pet. 11-12), which illustrates that authority to regulate imports once had existed under Section 11 of the Act, 50 U.S.C. App. 11, a provision that lapsed at the close of World War I, does not support petitioner's position. Congress amended Section 5(b) in 1941 specifically to grant to the President the authority to regulate imports. 55 Stat. 839. The fact that the authority contained in Section 11 lapsed earlier is irrelevant.

The remarks of Representative Kefauver, quoted at Pet. 12, do not demonstrate that Section 5(b) was intended to preclude the use of import surcharges to regulate imports. Representative Kefauver's understanding of what "the Treasury wanted" was clearly in reference to that portion of the 1941 amendment to Section 5(b) which permitted the President to utilize property seized under the Act. Representative Kefauver apparently overlooked the fact that elsewhere in that amendment Congress expressly added the term "importation" to the types of transactions the President was authorized to regulate in times of national emergency.

tainted" property (Pet. 12, 16-18) also is unfounded. Section 5(b) by its terms clearly and deliberately applies to "any property" of "any" foreign country or national. The language of Section 5(b) contrasts sharply, for example, with the reporting provisions of Section 7(a), 50 U.S.C. App. 7(a), which apply, *inter alia*, to persons who hold or control "property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or ally of enemy * * *." Had Congress intended in Section 5(b) to limit the President's authority to "enemy-tainted" property, it could easily have so provided. In any event, the legislative history of Section 5(b) is devoid of any indication that Congress intended the statute to apply other than according to its plain meaning.[6]

Petitioner's reliance on *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, is misplaced. That case concerned the right of an alien to sue under Section 9(a) of the Trading with the Enemy Act to recover property seized under the vesting power of Section 5(b); it did not involve the scope of the regulatory power involved here. In any event, as the Court of Customs and Patent Appeals noted (Pet. App. 18a, n. 17), the Court in *Uebersee Finanz-Korp.*, "did not hold that the vesting power, let alone the regulatory power, was limited to property having an enemy

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[6] The Court of Customs and Patent Appeals correctly held in *Yoshida* that the title of the statute does not restrict its scope (Pet. App. 22a, n. 22). See *Brotherhood of R.R. Trainmen* v. *Baltimore & O. R.R. Co.*, 331 U.S. 519, 528-529.

'taint.'" Indeed, this Court confirmed that "[t]he property of *all* foreign interests was placed within reach of the vesting power * * *." 332 U.S. at 485 (emphasis supplied). See also *United States* v. *Broverman*, 180 F. Supp. 631, 634-635 (S.D. N.Y.).[7]

Finally, petitioner's contention that Proclamation 4074 was beyond the scope of authority delegated in Section 5(b) and "subvert[ed] the manifest Congressional intent to maintain control over its Constitutional powers to levy tariffs" (Pet. 11) is at odds with the intent and understanding of Congress reflected in recent legislation. First, as noted above, the Trade Act of 1974 specifically authorizes the President to impose surcharges to respond to balance-of-payments problems. Second, in the National Emergencies Act, Pub. L. 94-412, 90 Stat. 1255, 50 U.S.C. 1601 (September 14, 1976), Congress responded di-

[7] Similarly, the decision of the court below that Section 5(b) is not limited to enemy-tainted property is not in "apparent conflict" (Pet. 16) with the decision of the Third Circuit in *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F. 2d 676, certiorari denied, 409 U.S. 933. There, in fact, the Third Circuit upheld the seizure of literature from North Vietnam under the authority of Section 5(b) and rejected claims that Section 5(b) was an unconstitutional delegation of legislative authority and that, as applied to literature, the authority exercised was invalid under the First Amendment. The court did not hold that Section 5(b) was limited to enemy-tainted property—an issue which, in any event, was not before the court. Moreover, the Third Circuit stated that in the absence of the First Amendment questions presented in that case, "we would have no difficulty holding that the delegation does not render the statute unconstitutional * * *." 459 F. 2d at 679-680.

rectly to concerns with respect to the President's authority to exercise extraordinary powers by declaring national emergencies. In that statute Congress placed conditions on the declaration of emergencies and provided for termination of declared emergencies. However, notwithstanding the President's recent action in Proclamation 4074 and the court's opinion in *Yoshida*, Congress expressly exempted the powers and authority under Section 5(b) of the Trading with the Enemy Act from the provisions of the National Emergencies Act. See Section 502(a)(1) of that Act, 50 U.S.C. 1651(a)(1).[8] The foregoing legislative actions further confirm that Proclamation 4074 was within the authority Congress intended to delegate in Section 5(b). See *Federal Energy Administration* v. *Algonquin SNG, Inc.*, *supra*, slip op. 21-22; *Pike* v. *United States*, 340 F. 2d 487, 488 (C.A. 9).

3. The Court of Customs and Patent Appeals correctly rejected petitioner's broad contention that, if Section 5(b) authorized Proclamation 4074, the statute unconstitutionally delegates legislative authority. In *Federal Energy Administration* v. *Algonquin*

[8] Section 502(b) of the National Emergencies Act directs all appropriate Committees of Congress to "make a complete study and investigation" of the laws, including Section 5(b), exempted from the operations of that Act, and to make a report of their recommendations and proposed revisions to their respective Houses within a specified time. There is therefore no basis for petitioner's fears that the decision below "threaten[s] the very heart of constitutional government," "leaves the stage set for other unfettered presidential action," and "creates a vast potential for future abuse" (Pet. 10, 13, 18).

SNG, Inc., supra, this Court reaffirmed the proposition that a statute is not an unconstitutional delegation of legislative power if it contains an intelligible principle to which the President is directed to conform his exercise of the authority delegated (slip op. 10, citing *Hampton & Co.* v. *United States*, 276 U.S. 394, 409). Section 5(b) satisfies this standard. See *Veterans & Reservists for Peace in Vietnam* v. *Regional Commissioner of Customs*, 459 F. 2d 676, 679 (C.A. 3), certiorari denied, 409 U.S. 933; *Sardino* v. *Federal Reserve Bank of New York*, 361 F. 2d 106, 110 (C.A. 2), certiorari denied, 385 U.S. 898.

The authority delegated by Section 5(b) is exercisable only in "time of war" or "any other period of national emergency declared by the President," limitations that "inherently preclude prior prescription of specific, detailed guidelines * * * [and] the otherwise oft provided requirement for prior hearings, extensive fact finding * * * and the like" (Pet. App. 33a-34a). In such circumstances the permissible scope of legislative delegation is necessarily somewhat broader than might be warranted in non-emergency times. Cf. *American Power Co.* v. *Securities and Exchange Commission*, 329 U.S. 90, 105; *Yakus* v. *United States*, 321 U.S. 414, 441; *Nielsen* v. *Secretary of the Treasury*, 424 F. 2d 833, 843 (C.A. D.C.).[9]

[9] Petitioner does not appear to dispute that Proclamation 4074 was limited in scope and duration and was reasonably related to the emergency declared. The court in *Yoshida* correctly held that the validity of an exercise of authority must be judged on the basis of the specific action taken, not, as petitioner's arguments suggest, on the basis of what actions might conceivably be taken in the future (Pet. App. 25a).

Moreover, Section 5(b) pertains only to foreign property. As this Court observed in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

Finally, neither Section 5(b) nor Proclamation 4074 represents an abdication by Congress or a usurpation by the President of Congress' plenary power over foreign commerce. The court in *Yoshida* correctly noted that "[t]hroughout the 114 year life of the TWEA and its progenitors, Congress has repeatedly exercised its untrammeled plenary power over foreign commerce" (Pet. App. 36a). Moreover, the temporary import surcharges imposed by Proclamation 4074 were carefully fashioned so as not to exceed the import duties established by Congress. Since Proclamation 4074 was issued, Congress has continued to exercise its authority over tariffs and to supervise the authority that it has delegated to the President in times of national emergency. There is therefore no basis for petitioner's contention that the decision below authorizes executive intrusion into the powers of Congress under the Constitution.

4. Section 350(a)(6) of the Tariff Act of 1930, 19 U.S.C. 1351(a)(6), and Section 255(b) of the Trade Expansion Act of 1962, 19 U.S.C. 1885(b), both authorize the President to terminate, "in whole or in part," any rate of duty that he had previously proclaimed in order to implement a foreign trade agreement. ~~We disagree~~. In our view, those statutes also provided authority for Proclamation 4074. Since the surcharge imposed by Proclamation 4074 was limited to articles that had been the subject of prior tariff concessions and thereby of prior proclaimed rates of duty, Proclamation 4074 was valid as an exercise of the President's authority to terminate "in part" a proclaimed rate of duty.[10] The de-

[10] The Customs Court in *Yoshida* rejected this contention upon the basis that General Headnote 4(d) of the Tariff Schedules of the United States, 19 U.S.C. 1202(4)(d), provided that when a proclaimed rate is terminated, the rate shall revert, "unless otherwise provided," to the next intervening proclaimed rate which has not been terminated, or, if none, to the statutory rate. As the Customs Court interpreted it, the phrase "unless otherwise provided" merely served to authorize the President, when terminating a proclaimed rate, to specify that the new rate shall not be the next intervening proclaimed rate but some rate established in some other previous proclamation (Pet. App. 53a). The Court of Customs and Patent Appeals agreed with this position (Pet. App. 15a-16a).

There is no support for the position of the courts in *Yoshida* on this point. General Headnote 4(d) applies only in the situation where, after terminating a proclaimed rate, the President does not specify a new rate. In those circumstances, *i.e.*, where the new rate is not "otherwise provided" for by the President, that rate is established by General Headnote 4(d).

Similarly, the court's reliance on *United States* v. *American Bitumuls & Asphalt Co.*, 246 F. 2d 270 (C.C.P.A.), certiorari

cision of the court below, that that authority only authorizes the President entirely to replace existing rates with rates that have previously been proclaimed or prescribed by statutes, ignores, or renders meaningless, the statutory words "in whole *or in part*" (emphasis supplied).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1976.

denied, 355 U.S. 883, is misplaced. There the court held only that the President's authority to terminate a rate was not limited by another statutory provision placing percentage limits on his authority to proclaim new rates. The court did not consider to what extent the President could terminate a rate "in part."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-312

ALCAN SALES DIV. OF ALCAN ALUMINUM CORPORATION,
Petitioner,

vs.

UNITED STATES,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This Reply responds to the Government's arguments in opposition to certiorari which were not considered in the Petition.

The principal contention of the Brief in Opposition (herein "Gov't Brief") is that the *Yoshida* decision of the Court of Customs and Patent Appeals—upholding the presidential surcharge on imports under Section 5(b) of the Trading with the Enemy Act ("TWEA")—"is of no continuing substantial importance" and "has little if any prospective significance" (Gov't Brief, 6, 7), primarily because of two post-surcharge statutes, one enacted before and one after the *Yoshida* decision (Gov't Brief, 12-13).

The first statute, the Trade Act of 1974, Pub.L. 93-618, 88 Stat. 1978, while authorizing the President to impose certain limited import surcharges in the future, expressly was intended to have no effect on the pending *Yoshida*

litigation, which involved presidential power under other statutes. The second, the National Emergencies Act, Pub. L.94-412 (to be codified in 50 U.S. C. § 1601) (September 14, 1976), did not legitimate or even affect the *Yoshida* gloss on Section 5(b) of the TWEA as authority for Proclamation 4704.

Yoshida remains unimpaired by either of those two statutes; renders them of no continuing significance where the President seeks to levy import duties on the basis of a declared emergency; and, unless overturned by this Court, will stand as a charter for abuse of Executive power.

I. The Trade Act of 1974

Section 122 of the Trade Act of 1974, 19 U.S.C. § 2132 (Supp. IV 1974), authorizes the President to impose an import surcharge of not more than 15 percent ad valorem, for not more than 150 days, if import restrictions are required to (1) deal with United States balance-of-payments deficits; (2) prevent imminent serious dollar depreciation; or (3) cooperate with other countries to correct an international balance-of-payments disequilibrium. The Government argues that this Congressional action renders the *Yoshida* decision of no continuing importance and of little prospective significance and its review unnecessary (Gov't Brief, 6-7). The argument is untenable.

In enacting Section 122, Congress made clear that it did not intend thereby to affect the pending *Yoshida* litigation.[1] Indeed, in Section 611 of the same act, Pub. L. 93-618, 88 Stat. 1978 (1975), Congress extended from two to five years the time limit for administrative review of protests against Proclamation 4074 surcharge levies. The extension was granted to "permit the resolution of [the *Yoshida*] appeal and any subsequent appeals without denying the thousands of protests already made."[2]

[1] S.Rep. No. 93-1298, 93d Cong., 2d Sess. 88, *reprinted in* [1974] 4 U.S. Code Cong. & Ad. News 7186, 7237.

[2] *Id.* at 235, 4 U.S. Code Cong. & Ad. News at 7363.

Despite Section 122 of the Trade Act of 1974, the President retains today any power that he had in 1971 to impose import duties under Section 5(b) of the TWEA.[3] The *Yoshida* decision is based on the notion that there are two overlapping sources of presidential power to affect customs duties, the first being trade legislation with its guidelines and limitations (such as the Tariff Act of 1930, Trade Expansion Act of 1962, and Trade Act of 1974) which is effective in "normal" times, and the second being Section 5(b) of the TWEA, without such guidelines and limitations, which supersedes during "emergencies." (Petition, App. 27a-28a). As long as *Yoshida* stands and these dual powers persist, the tariff authority so carefully delegated under provisions such as Section 122, with its attendant limitations and safeguards, may be completely overridden by Section 5(b) powers in a declared emergency. The Trade Act of 1974 is purely trade legislation, does not deal with emergency powers, and does not mention, much less amend, Section 5(b). It was adopted at a time when the surcharge imposed by Proclamation 4074 had been held invalid by the Customs Court under both the trade laws and the TWEA.

This means that the President could choose to impose future surcharges under Section 5(b) rather than Section 122 in order to levy duties of over 15 percent ad valorem or for over 150 days, or to impose a surcharge for some purpose other than those to which presidential power is restricted by Section 122.

The "prospective significance" of the *Yoshida* decision was recently attested by reliance upon it in an opinion by the Office of Legal Counsel of the Department of Justice as authority for President Ford's issuance, under Section

[3] It is our position that the President never had any surcharge power under Section 5(b). On the other hand, the Government, despite the passage of the Trade Act of 1974, has described the President's Section 5(b) power to regulate imports as "plenary." Brief for Petitioner at 51, Federal Energy Administration v. Algonquin SNG, Inc., 95 S. Ct. 2295 (1976).

5(b), of Executive Order 11940 of September 30, 1976, 41 Fed. Reg. 43707 (1976), continuing in effect all regulations issued pursuant to the recently lapsed Export Administration Act of 1969, as amended, 50 U.S.C. App. § 2401 (1970).[4] The *Yoshida* decision is viewed by the Executive branch as a grant of presidential power to regulate trade under Section 5(b) even in areas where Congress has exercised a legislative prerogative to end such regulation.

II. The National Emergencies Act

The Government also argues (Gov't Brief, 12-13) that the exemption of Section 5(b) from the provisions of the National Emergencies Act, Pub. L.94-412 (to be codified in 50 U.S. C. § 1601) (September 14, 1976) ("NEA"), confirms that Proclamation 4074 was within the authority Congress intended to delegate in Section 5(b). This can not be so.

First, the Act quite obviously is aimed at curtailing the use of the President's national emergency power. The Report of the Senate Committee on Government Operations noted that the NEA "is not intended to enlarge or add to Executive power"[5] and that certain laws containing the national emergency power, including Section 5(b) of the TWEA, had been used "often in ways not envisioned in the original legislative histories."[6] Second, although Congress did exempt the powers and authority conferred by Section 5(b) of the TWEA from the provisions of the NEA,[7] it did so only to avoid disruption of the day-to-day operations of Governmental departments.[8]

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[4] Letter from Antonin Scalia, Ass't Att'y Gen'l, to J. T. Smith, Gen'l Counsel of Dep't of Commerce, Sept. 29, 1976, *reprinted at* Int'l Trade Rep. (BNA) M-1 (Oct. 19, 1976).

[5] S.Rep. No. 94-1168, 94th Cong., 2d Sess. 3 (1976).

[6] *Id.* at 8.

[7] Pub. L. 94-412, § 502.

[8] *Id.* at 7. *See also* 121 Cong. Rec. H8329 (remarks of Rep. Flowers), H8329 (remarks of Rep. Mazzoli), H8330 (remarks of Rep. Hutchinson) (daily ed., Sept. 4, 1975); 122 Cong. Rec. S14842 (daily ed. Aug. 27, 1976) (remarks of Sen. Church).

Third, Congress refused to exempt Section 5(b) totally from the provisions of the NEA requiring termination within two years of all existing declared emergencies. Instead, Congress allowed certain emergency provisions of law, including Section 5(b), to remain effective, pending conversion of those provisions eventually deemed worth preserving into "standard, non-emergency" laws.[9] However, the expectation that Congress will legislate is no guarantee that it will ever do so. The NEA requires only that appropriate Congressional committees study and investigate and then report; Congressional action, if any, following such reports could take an indefinite period of time.

In the meantime, while the *Yoshida* decision continues as the last word, the President is free to assume a prerogative reserved by the Constitution to Congress.

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[9] H.Rep. No. 94-238, 94th Cong., 1st Sess. 11 (1976); *see also* 121 Cong. Rec. H8329 (daily ed. Sept. 4, 1975) (remarks of Rep. Flowers).